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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

IN THE MATTER OF THE VALUATION PROCEEDINGS
UNDER §§ 303(c) AND 306 OF THE REGIONAL
RAIL REORGANIZATION ACT OF 1973

CENTRAL JERSEY INDUSTRIES, INC.,
a corporation of the State of New Jersey, *et al.*,
Appellants,

v.

THE UNITED STATES RAILWAY ASSOCIATION AND
THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

APPENDIX
TO
JURISDICTIONAL STATEMENT

VOLUME II
Pages CA-525 to CA-927

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September 21, 1984

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This Appendix is submitted by the Appellants, which consist of Central Jersey Industries, Inc. and its subsidiaries, The Central Railroad of Pennsylvania, the Communipaw Central Land Company, the Dover and Rockaway Railroad Co., the Mt. Hope Mineral Railroad Co., the Wharton and Northern Railroad Company and the Bayshore Connecting Railroad. There are no other subsidiaries or affiliates of any of the Appellants except for certain wholly owned subsidiaries of Central Jersey Industries, Inc.

Appendix H

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed November 24, 1981, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

Before FRIENDLY, Presiding Judge, and WISDOM and THOMSEN, Judges.

Opinion With Respect to Valuation for Rail Use

(continued from Volume I)

XII. PROFFERS OF FREIGHT LINES AT CAPITALIZED EARNINGS—ISSUES NOT HERETOFORE CONSIDERED

This Section Continued from Page CA-524 of Volume I

(Dec. 31, 1978) at 39. Accordingly, our consideration will be devoted to a Western or Chessie acquisition of the EL-LV combination, which would include the sale of freight lines in Northern New Jersey in the package.[279]

Our discussion will deal with four topics:

(1) Whether or not there would have been competitive bidding for the EL-LV combination.

(2) The validity of the EL-LV earnings estimates.

(3) EL's claim for a $100 million enhancement in price because of New York's alleged willingness to make a grant of that amount to the purchaser of its route across the Southern Tier.

(4) The effect of our rejection of the JT proposal.

1. *The Existence of Competitive Bidding*

For reasons developed in Part V, we must face at the outset the question whether there would have been competitive bidding for the EL-LV combination. We find that there would have been.

The rock on wich EL's case with respect to competitive bidding was built was that the roads running west from the principal gateways of Chicago[280] and St. Louis would not have sat by and witnessed the disappearance of the only railroads that gave them satisfactory access to New York, Northern New Jersey, New England, and Southeastern Pennsylvania. The Chessie's route from Chicago to New York was exceedingly circuitous; the Norfolk & Western had none. The situation with respect to the Philadelphia area was similar, although Chessie's disadvantage was not so great.[281] Once one Western line moved toward an acquisition, whether of EL or, perhaps more likely, of a PC west-east IFL, others would follow. Chessie and Norfolk & Western, dismayed at the Western invasion of the East, would have entered the fray to blunt its effects so far as possible; indeed, they might have moved earlier in an effort to forestall the invasion.

EL offered two important pieces of evidence in support of this scenario. One was a study made on his own initiative by John Darling, Acting Director of Cost Analysis and Research of the Santa Fe.[282] The study is reproduced at Shannon (S) (EL) (Dec. 31, 1978) Ex. 1. He noted that EL and Santa Fe shared a number of common characteristics, including small amounts of branch mileage, reputation as high speed railroads, and major emphasis on trailer on flat car (TOFC) traffic. Darling's preliminary report concluded that after a six-year rehabilitation period, EL would contribute annual net after-tax income of $28,488,000 to the consolidated net income of the Santa Fe. This was projected to grow at an annual average rate of 15.4 percent until it leveled off to an annual growth rate of 5.1 percent ten years after the acquisition. These assumptions were predicated on an average inflation rate of 4.6 percent per year with no significant EL traffic growth. By becoming the first transcontinental railway system Santa Fe would have had important opportunities to gain new traffic, although these were not taken into specific account. While EL had been undermaintained, Darling did not think the road had deteriorated to the point reached by PC or some other bankrupts.

The report was distributed to members of Santa Fe's executive department, to Lee Hudson, Vice President of Traffic and to John Barriger, the Assistant to the President-Staff Studies, who expressed concern about retaliation by other railroads. A further study, made by Darling and signed by Robert Keyes, his supervisor, concluded that "the retaliation of any one or group of railroads in the northeast could not result in the long run diversion of sufficient traffic to negate the revenue gains of the traffic obtained by entering the northeast." Darling (D) (Jan. 31, 1978) at 30, EL App. A at 99.

Santa Fe concluded not to pursue the matter, apparently because of fear of opposition by other railroads.[283] However, Hudson contacted a Peter Lutken of Murchison Brothers. Hudson reiterated Darling's conclusion that EL could be operated

profitably and Santa Fe's concern that its interchange business, particularly the TOFC business, "would be jeopardized if Erie should fall into the hands of less friendly or less competent owners." Lutken (S) (Dec. 31, 1978) at 2. With Murchison's approval, Lutken contacted Maxwell, President of EL. No offer materialized. According to EL, this was because Maxwell was obliged to fix a two week deadline in light of the date set for Chessie's final acceptance of USRA's offer of part of EL under the FSP, *id.*

A much more elaborate study of EL was made by Chessie when, pursuant to the FSP, USRA offered part of EL to Chessie in 1975. This study involved several thousand man-hours of effort, with EL giving full cooperation and providing raw data that would not ordinarily have been made available. Two reports, presented to Chessie's Board of Directors on October 27, 1975, and November 19, 1975, showed that an EL acquisition would contribute net pre-tax income of $36.3 million and $30.7 million to Chessie's earnings. The difference is largely attributable to a reassessment of the operating costs and revenue gains from the additional EL traffic operating over Chessie's lines. The reports are reproduced at Shannon (S) (EL) (Dec. 31, 1978) Ex. 12, 13. These reports were prepared not to assist Chessie executives in negotiating with EL but to justify the acceptance of USRA's bargain offer.[284] Indeed, at a meeting of Chessie executives held prior to submission to the directors, serious question was raised whether the estimates of per diem charges were not too high by as much as $11 million a year and it was noted that all budgets appeared to be based on a very conservative approach, to the point that Chessie's President, H.T. Watkins, asked "Have we gone too far?" Watkins' attitude, and his direction that the Chessie study be kept confidential within top management, see White (D) (July 18, 1977) Ex. 13, EL App. A at 109-13, stand in considerable contrast to the comment of James White, author

of the study, much cited by the GPs, that "there was great sentiment [in Chessie] that said 'We are not interested in Erie, it's a dog' ". 3 GP at H 56-57 n.22.

The GPs naturally sought to downplay the force of EL's evidence. With respect to Western line acquisitions, they rely not only on the testimony of Barriger, see note 283, *supra*, and accompanying text, but on statements of Frank Barnett, former Chairman of the Union Pacific, Alan Boyd, former President of Illinois Central Gulf, and Thomas Lamphier, then President of Burlington Northern. Although Barnett, Barnett (S) (Nov. 1, 1979) at 3, strongly stated his belief that the Union Pacific "would [not] have been interested in acquiring any of the Penn Central's lines, or for that matter any of the lines of the Northeastern bankrupts (including Erie-Lackawanna's Chicago to New York line)", his two major reasons, massive rehabilitation costs and ICC-imposed labor protection costs, might not have been such important factors with respect to EL, see Parts VIII and IX.[285] Moreover, his professed disinterest in any of the east-west lines of the bankrupts contrasts strongly with his dire warnings in testimony to a Senate committee in 1973 about the effect on the national economy in general and the Western railroads in particular if Congress failed to enact the Rail Act, Shannon (S) (EL) (Dec. 31, 1978) Ex. 6; we cannot escape the belief that his avowed unwillingness to do anything to pull the Union Pacific's valuable chestnuts out of the fire stemmed from his belief that the government would and should perform the task instead. Boyd, as President of a north-south line, was naturally less preoccupied by the threat of a shutdown of the bankrupts. Moreover, his comments were addressed primarily to the IFLs. Lamphier, who had not read any of the evidence in the case, conceded that a shutdown of the PC lines from Chicago would have harmed the Burlington Northern; that if a competitive bid were made for a PC line, Burlington Northern would have been faced with a choice of attempting to block the offer before the ICC — a rather unlikely prospect — or submitting a competing bid. Cross-examination

developed a memorandum from Lamphier's predecessor as President to the then Chairman of Burlington Northern, Lamphier (D) (June 19, 1980) Ex. 1 (GPs), EL App. H at 78-81, making clear that acquisition of any PC or EL line by a competitor would have seriously impaired Burlington Northern revenues; that Burlington Northern would have gained revenues by acquiring one of those lines; and that EL's lines would have been among those considered. Altogether we cannot conclude that, with the number of Western lines available as purchasers, not one would have made a bid for EL. On the contrary, we think it highly likely that at least Union Pacific, Santa Fe, and Burlington Northern would have been bidders for the three available Chicago-New York lines, and that Southern Pacific, Missouri Pacific, and perhaps Union Pacific would have bid for PC's IFLs running east from St. Louis, especially the St. Louis-Harrisburg line, which afforded access to New York either via Amtrak through Philadelphia or via R and CNJ, and to Philadelphia through R. Since Missouri Pacific could not have been sure of obtaining PC's St. Louis-Harrisburg line, it might also have bid on one of the lines running east from Chicago to which it had access by its subsidiary, the Chicago & Eastern Illinois.[286] It seems highly likely that with this much prospect of Western lines entering the east, Chessie would have bid either for PC's water-level route between Chicago and New York, or for EL's route or the EL-LV combination between Sterling, Ohio, and the Northern New Jersey terminals. While the water-level route was doubtless the best route between Chicago and New York, Chessie would have encountered stiff competition from Western carriers on such a purchase and the EL-LV combination would have been less expensive since Chessie would not have been obliged to acquire 372.7 miles between Chicago and Akron, Ohio.[287]

In attacking the prospect of a Chessie bid for EL, the GPs begin, 3 GP at H 40, with abortive meetings between Chessie and EL officials during 1974, after the Rail Act had been passed but before EL had come under it, in which Chessie said that it "would

not consider acquiring the Erie Lackawanna, in whole or in part, under a Section 77 proceedings [sic]." We find this of little significance. For reasons indicated above, the Rail Act had ended the threat of a Western invasion, and if Chessie were going to acquire EL, it would obviously be preferable to do so under the Rail Act, with Government financing of labor protection, rather than without it. The GPs also argue that the collapse of USRA's offer to Chessie in the FSP, 1 FSP at 14, of a "package" consisting of "most EL freight services east of Sterling (Akron), Ohio, most of Reading services [plus] the Charleston, W. Va., market of the Penn Central and access to some CNJ traffic in the Elizabethport/Perth Amboy, N. J. areas", demonstrates that Chessie had no interest in acquiring EL. In fact, the collapse was due to the inability of Chessie to agree with certain labor unions that the protective conditions for workers on the acquired lines should be the same as those prevailing on Chessie rather than the much more liberal ones provided in § 505 of the Rail Act. The GPs also rely on figures developed during the negotiations. USRA had originally asked $114.1 million for the package, based on the net liquidation value or going concern worth of the various parts of the package, whichever was greater. USRA allocated only $14.9 million to EL as its liquidation value, since going concern value was estimated as negative. Chessie accepted on condition that the price be paid 20 percent in cash and 80 percent on B&O bonds, which USRA considered as a cash equivalent of approximately $62 million. Both sides having held fast for some time, Chessie moved to break the log-jam by offering, on October 28, 1975, $26.4 million for the R and PC Charleston properties but said that it had found EL to be "essentially without value" and was "concerned that EL's earning power was marginal or negative." Ex. GPS-PP-53 at 1. When USRA insisted on the sale of the package, Chessie raised its offer to $52.61 million. Agreement was ultimately reached at $54.5 million for the package, with Chessie emphasizing that "the maximum amount we can pay is net liquidation value. *Id.* 55 at 1.

We find little force in all of this. Chessie was toughly negotiating to pay as little as possible. How USRA could have come out with a net liquidation value of only $14.9 million for EL is beyond our conprehension; the FSP, 1 FSP at 142, had estimated this at $60.27 million. When Chessie was asserting to USRA that EL had no earnings value, it had in hand detailed confidential studies made by its own employees showing anticipated annual pre-tax earnings of $30.7 and $36.3 million — studies which its management thought might be too conservative.

In light of the foregoing, we find that in all likelihood there would have been competitive bidding for EL or a combination of EL and LV by Chessie, and by more than one Western line in the absence of the Rail Act. As for the Norfolk & Western, while we believe that EL has established that Norfolk & Western would have been interested in purchasing EL, EL has failed to establish how interested Norfolk & Western would have been. We cannot simply assume that the earnings studies which EL presented for the EL and EL-LV Chessie acquisitions can be applied directly to purchase by Norfolk & Western. Accordingly, we find that Norfolk & Western would not have been a factor in the bidding. A practical consequence of all this is that we need not overly concern ourselves with the value of an EL-LV Chessie acquisition since Chessie would pay at most only slightly more than a Western acquirer. See note 151, *supra*.

2. *The Earnings Projections for EL-LV*

The GPs summarize their belief that EL's earnings projections lack credibility when they say in their reply brief, 1 GPRB at F 19, that, although EL lost $4,729,000 in freight operations in 1973 (and had done worse in 1972 and was to do worse in 1974), the earnings projections assume first year net railway operating income ranging from $18 million to $37 million.[228] The GPs contend that EL offered no sufficient explanation for this

"remarkable rebirth of earnings power"; EL and LV claim they did.

The EL and EL-LV earnings projections rested on three essential building blocks. These are:

> (a) Studies by Laurie for EL and Adik for LV of the traffic and revenues which the restructured properties could expect either as part of a transcontinental railway system or as part of the Chessie;
>
> (b) Studies by Edward Jennison[289] and Adik of the cost of carrying this traffic;
>
> (c) Adjustments by Shannon to reflect additional revenue or lessened expenses not considered in (a) and (b).

(a) *Laurie's and Adik's Traffic and Revenue Studies*

We find it unnecessary to detail the methodology used by Laurie and Adik in making their traffic studies of the EL and combined EL-LV acquisitions since we are unimpressed with the GPs' criticisms that these did not adequately "evaluate the entire northeastern rail network of the bankrupts, including changes in ownership". 3 GP at H 78-79.[290] It would have been impossible to predict just what these changes would have been.[291] We are satisfied that Laurie and Adik did as well as could have been done with the information available to them, and, more importantly, as well as an analyst for a prospective purchaser would have done, and that any overstatements of added traffic due to reroutings are more than counterbalanced by the probability of other traffic gains that were not quantified, see, pp. 270-71, *infra*.

The attack on Laurie's and Adik's studies that does require serious consideration is that the "complete reliance upon a single year, 1973, which was an abnormally good year in the rail industry, created a significant upward bias in the results of EL's traffic studies." 3 GP at H 79.

Elaborating on this, the GPs seek to refute Laurie's justification, namely, that during the 1963-73 period EL's traffic had increased at a rate of approximately 2 percent per year, Laurie (D) (July 31, 1979) at 867-69, 13 GP Supp. App. at 491-93; Laurie (D) (July 31, 1979) Ex. 37, 13 GP Supp. App. at 502, by pointing out that the growth had occurred between 1963 and 1969, after which traffic declined each year until 1973.[292] The GPs also relied on the facts that in their profitability analysis of EL, R, and PC properties performed during 1973, Chessie officials concluded that 1973 had been "a very good year, and not representative", White (D) (July 22, 1977) at 548, 21 GP Supp. App. at 625, and considered traffic and revenue data from 1973, 1974, and the first five months of 1975, *id.* (July 18, 1977) at 74, 21 GP Supp. App. at 572; *id.* (July 19, 1977) at 198-200, 21 GP Supp. App. at 585-87; and that Chessie ultimately rejected 1973 data and used only 1974 and part-year 1975 traffic data, *id.* (July 19, 1977) at 199-200, 21 Supp. App. at 586-87; *id.* (July 21, 1977) at 405-06, 21 GP Supp. App. at 609-10. They relied also on the fact that Darling, in his study for Santa Fe, concluded that EL's traffic levels in 1975 and 1976 would be below those in 1973. Shannon (S)(EL)(Dec. 31, 1978) Ex. 1 at 59-60. However, they failed to inform us that Darling also thought that for the whole period 1975-84 EL freight traffic would "remain constant" at the 1973 level. *Id.* The GPs also relied on a forecast of the combined traffic of PC, EL, R, LV, CNJ, and AA prepared by GPs witness Robert Waldner, an employee of Temple, Barker & Sloane, the consultant in forecasting used by the GPs in this proceeding, from a "perspective of early 1976". 3 GP at H 89, *et seq.* Waldner found that over the 1976-85 period, traffic of the bankrupts would have somewhat increased, but that, for a number of commodities, comprising 48 percent of EL's freight traffic, volume would have declined from 1973 to 1978 by figures ranging from 2.9 percent to 15.5 percent.

EL points out that the drop from 1973 to 1974 was not particularly drastic, especially considering that 1974 was a year of deep

recession, and seeks to account for the sharp decline in 1975 on the basis that shippers were uncertain of EL's future in view of the uncertainty, not dissipated until our decision of April 11, 1975, *In the Matter of Erie Lackawanna*, 404 F.Supp. 954, whether EL would be allowed to reorganize under the Rail Act. However, EL's stronger answer is that matters should be viewed from the perspective of early 1974, by which time decisions on purchases would have been made, rather than with the hindsight of later years. Here EL draws great comfort from the fact that the GPs' own forecasting consultant, Temple, Barker & Sloane, in late 1974 and 1975 predicted in one study that EL's traffic level would exceed the 1973 level in the years 1977-80 and in another study that it would exceed that level in 1985, see Temple, Barker & Sloane, Forecast of Traffic and Revenues, 1974-1980, Volume III, Forecast of Conrail Traffic and Revenues, 1985 (Dec. 1974) at Ex. 1-1, EL App. O at 287.

We do not believe EL is to be faulted for using 1973 traffic and revenue data. As indicated in Part X of this opinion, discussions of the future of the bankrupts would have begun in 1973 and the purchase price would have been established in early 1974, even though ICC approval would not have been obtained that soon. Nineteen seventy-three would thus have been the last full year for which data would have been available, and developments in early 1974 would not have indicated that it was untrustworthy.

(b) *Jennison's and Adik's Cost Studies*

Jennison's and Adik's expense estimates were prepared as follows: EL and LV freight costs were broken down into "unit costs" representing costs per car originated or terminated, costs per car interchanged, and costs per loaded car mile. These were then multiplied by the related counts of service units. In the studies relating to EL alone, the only costs eliminated were:

(1) The expenses of operating and maintaining the EL docks at Hoboken and the EL car floats that had operated

in New York harbor. This was done because Shannon had concluded that neither a Western line nor Chessie would have acquired these facilities.

(2) Property taxes to New York State and its municipalities. This was done on the basis of testimony by Louis Rossi of the New York Department of Transportation that the State and the municipalities would have committed themselves to exempt EL properties from taxation as an inducement to the acquisition of EL by a profitable railroad.

(3) A portion of the property taxes in New Jersey and of the payroll taxes attributed to the New Jersey freight service.

(4) Maintenance of way expenses attributable to the EL suburban lines in New Jersey, which would have been acquired by the State.

(5) Maintenance of way expenses attributable to non-acquired branch lines.

In the EL-LV studies Jennison eliminated all New Jersey state taxes, and certain other expenses for the handling of EL and LV traffic in New Jersey on the ground that the EL and LV lines would have become part of the NJ/NYTerm, and substituted the trackage rights fees and switching charges calculated in the JTs study, Jennison (S)(EL)(Dec. 31, 1978) at 15, 17. In the EL-LV studies, it was recognized that because of the much heavier movement over LV's line resulting from the abandonment of EL's Scranton line, its 1973 maintenance of way expenses would have been inadequate. Hence the experts eliminated these expenses and the EL maintenance of way expenses for traffic that would now move over LV's Waverly-Northern New Jersey line, and Adik developed a detailed study of normalized maintenance requirements adequate to handle the increased traffic. These did not include overhead items since Shannon concluded that most of

such items would be eliminated if LV became a part of EL and made separate provisions for those that would not be. Jennison also eliminated LV dock and car float expenses and New York and certain New Jersey property taxes for the same reasons indicated with respect to his EL studies. In the case of the Chessie acquisition, costs of the movement of EL-LV traffic over the B&O line west of Sterling were computed on the basis of the B&O 1973 ratio of variable costs to systems revenue, to wit, 77.6 percent.

The first principal attack by the GPs on the expense estimates is that EL's earnings studies substantially understated the switching charges that would have been charged by the public bodies in Northern New Jersey. However, since we reject the JTs case and find that the acquirer of the EL-LV main line would have acquired the EL-LV JT properties as well, we do not have to deal with this problem. As already discussed, the GPs further claim and we agree that the trackage rights fee estimated by EL for use of the passenger lines was too low. See pp. 244-51, *supra*.

The GPs also claim that Jennison improperly calculated the cost of handling:

> (1) former LV traffic considered to move over EL's lines west of Waverly, N.Y., in the assumed EL-LV combination acquisition, and (2) former EL and LV traffic considered to move over B&O's line between Sterling, Ohio, and Chicago, in the assumed Chessie acquisitions of EL and LV lines.

3 GP at H 155-56. Jennison's theory was that "modest" increases in traffic of up to "20 or 25 percent" could be handled on an incremental cost basis, which in EL's case he estimated to be 71.4 percent of revenues, Scheer (S) (Jan. 30, 1980) at 15-16, as opposed to a full freight cost to revenue level of approximately 97.3 percent, EL 1973 Form R-1, Schedule 310; Jennison (S) (EL) (Dec. 31, 1978) App. 1 at 4; *id.*, App. 3 at 2. For traffic increases over 25 percent, Jennison applied a "variable" cost-

revenue ratio, which was an average of EL's full and incremental cost-revenue ratios. See pp. 242-43 & n.272, *supra*. The GPs assert, 3 GP at H 156 n.66, that application of B&O's variable cost ratio of 77.6 percent rather than its full cost ratio of 93.5 percent to Chessie's acquisition of the EL-LV package accounted for an increase to annual net income of $10,730,000.

A principal difficulty facing the GPs is that they produced no expert witness to testify that full costs should have been charged. Common sense tells us that unless a railroad is operating at capacity, some additional traffic can be accommodated at less than full cost. See p. 242, *supra*. There is no suggestion that the LV line between Waverly and Northern New Jersey was operating at anything like capacity; indeed, in another context, the GPs tell us that the LV was "starving for traffic". 3 GP at J 18. There is also no evidence that the B&O line between Sterling and Chicago was operating at capacity. Chessie in its own study applied incremental costs to EL traffic that would move over its lines as a result of rerouting, White (D) (July 20, 1977) at 347, EL App. N at 716; Sparrow (D) (Mar. 17, 1978) at 135-49, EL App. N at 731-45. Application of incremental or variable costs to added traffic was no invention of Jennison's; it is in general use by railroad experts throughout the country, see, *e.g., Rules to Govern the Assembling and Presenting of Cost Evidence,* 337 I.C.C. 298, 305-09 (1970). We see no reason to question Jennison's use of variable and incremental costs.[293]

The GPs also attack Jennison's use of a system average switching cost for work performed in the allegedly higher cost Northern New Jersey area. Although the GPs do not explicitly say so, this argument has little relevance to a Western line acquisition since all major yards were included and any understatement of New Jersey switching costs resulting from the use of a system average would be compensated by overstatement of such costs elsewhere. However, the GPs make a superficially appealing argument on this subject with respect to a Chessie acquisition. Since, in that proffer, the Chessie did not acquire EL lines west of Sterling,

Ohio, where switching costs are assumedly lower than those in the Northern New Jersey area, the use of a system average switch cost that included the allegedly efficient yards west of Sterling would tend to understate costs on the Eastern portions of the EL's lines. EL responds, ELRB at 122-24, we think correctly, that the GP's argument rests on the assumption that because switching costs in Northern New Jersey are higher than average, switching costs west of Sterling must be lower. The only testimony in the record on this point shows that the GP's assumption is wrong. Jennison testified that he believed the Marion Division (west of Sterling) switching costs were close to the system average, Jennison (S) (EL) (Dec. 31, 1978) at 14; Shannon testified that in his opinion Marion Division switching costs were higher than the system average because of inefficient operation in the deteriorated and antiquated Marion Yard. Shannon (S) (EL) (Dec. 31, 1978) at 12-13.[294] The GPs offered no evidence on this point

(c) *Shannon's Further Adjustments*

Shannon projected that by the fifth year after acquisition, net railway operating income would be substantially improved as a result of operating savings.[295] The principal items were:

(1) Savings in operating expenses from the rehabilitation program;

(2) Savings from the modernization of EL's classification yard at Marion, Ohio;[296]

(3) Savings from rebuilding EL's classification yard at Croxton, New Jersey;[297]

(4) Savings from single tracking EL's main line between Binghamton, New York, and Northern New Jersey via Port Jervis, New York, and in the case of acquisition of EL alone, parts of El's line between Binghamton and Northern New Jersey via Scranton, Pennsylvania.

While not denying the probability of some savings with respect to each of these items, the GPs argue that the amounts estimated by Shannon were so large that a purchaser would have viewed them with suspicion, especially since these items represented significant portions of total net railway operating income. Specifically the GPs say that:

> (1) It was error for Shannon to estimate the savings in overall expenses from rehabilitation and increased annual maintenance would be 5 percent of these sums, rather than to make a detailed examination of individual expense categories;
>
> (2) A potential acquirer would have viewed with suspicion Shannon's shift from an estimate of $3.4 million in annual savings from reconstruction of the Marion Yard made in the spring of 1973, Shannon (D) (May 25, 1979) Ex. 32 at 1, to an estimate of $6.4 million made in the fall of 1974, Shannon (D) (May 21, 1979) Ex. 1 at workpaper 206405, and would have wondered why a project with such stupendous savings, which EL admitted had been under continuous study since the mid-60's had not been completed long ago;
>
> (3) The plans for upgrading Croxton Yard were so incomplete that it was impossible to make any reasonable estimate of annual savings;
>
> (4) The plans with respect to single-tracking the Port Jervis line and parts of the Scranton line were likewise too indefinite for a purchaser to take savings from them into account.

We find little force in the GPs' criticism of Shannon's estimate of a savings in operating expenses of 5 percent of the total amount expended for rehabilitation and added maintenance. He explained that his long experience in the railroad industry had

taught him that companies generally figure on a 10 percent return on such expenditures, half of which takes the form of adding to or avoiding loss of revenues and half the form of reduced expenses. The benefits from rehabilitation and improved maintenance will also show up in the catastrophe accounts with consequent savings in overtime to train and yard crews and maintenance of way labor. These accounts amounted to between $18 and $19 million in 1973, and Shannon's projected savings represented only a 7 percent reduction in these expenses. We see no reason to believe that a purchaser would have doubted that a large program of rehabilitation and added maintenance would have produced this much of a saving in operating expenses; certainly the GPs adduced no credible evidence, expert or otherwise, to that effect.

The GPs' criticism of the Marion Yard figures are also lacking in force. This was a well-developed project, which the EL Trustee and management had submitted to the bankruptcy court and for which banks had committed to lend the funds. The commitment had been obtained on the strength of two reports by the independent engineering firm of Ford, Bacon & Davis. Both the cost of the project and the anticipated savings had been increased in the second, more detailed, report. We perceive no reason why a prospective buyer would have become suspicious over Shannon's use of these figures.

Omitting the Croxton Yard project, which would not have figured in the acquisition of an EL-LV combination, and the single tracking of parts of EL's Scranton line, which would have been abandoned in such a combination, we find equally little force in the GPs' objection that Shannon estimated an excessive "return" on the single-tracking of the Port Jervis line. The only substantial cost in such a project is the labor in picking up abandoned track, a cost that is largely offset by its salvage value. This work, as pointed out in a report by EL's operations planning department, Shannon (D) (May 21, 1979) Ex. 1 at workpaper 206344-206400, El App. N at 140-99, can be performed over any

convenient period of time. Nevertheless the savings begin immediately once the decision is made to stop maintaining one set of tracks.

The GPs' heaviest attack was reserved for Shannon's estimate of consolidation savings. These, they point out, also produce a very large share of projected net railway operating income. They claimed that Shannon relied on nothing more than judgment and the application of a supposedly universal but undisclosed "Wyer Dick formula".

The EL's opening freight brief, 1 ELF at 98-105, contained a detailed explanation of Shannon's method of estimating consolidation savings which showed that the GPs had either seriously misunderstood or mischaracterized Shannon's testimony. Railroad mergers fall into two general categories, parallel and end-to-end, although any particular merger is likely to have some characteristics of each. Parallel mergers provide an opportunity for savings by elimination of duplicative facilities and concentration of traffic on fewer lines. Organizational savings, which can be realized in both sorts of mergers, occur because the combined railroads do not need as many executives, lawyers, accountants, and traffic salesmen as had the two separate companies. Accounts particularly susceptible to reduction are the supervisory accounts, including the heads of the maintenance of way, maintenance of equipment, and transportation departments and their staffs; traffic department expenses, including the salaries of sales executives and field personnel and rental expenses for sales offices; and general expenses, including the executive, accounting, law, and medical departments. Employing the same general method as Wyer Dick had used in many railroad mergers since 1955, Shannon projected that either a Western purchaser or Chessie could have achieved savings of 50 percent of the expenses in the maintenance of way, maintenance of equipment, and transportation overhead accounts, 90 percent of the traffic department overhead,[298] and 70 percent of the general expenses. Shannon (S) (EL) (Dec. 31, 1978) at 59. He testified that he had checked his

results against those obtained by use of a different formula developed by John Barriger, another recognized expert in estimating merger savings, and found the results to be consistent. *Id.* at 59-60. He said also that he had compared his results with those of the Chessie study and found Chessie's figures also to be generally consistent. *Id.* at 84. He further concluded that in the EL-LV acquisition, almost all LV overhead expenses could be eliminated—a reasonable conclusion since, for all practical purposes, the acquired LV line was simply replacing EL's Binghamton-Scranton-Northern New Jersey lines and the overhead incident to the latter should be adequate to support the former.

The GPs presented the testimony of Albert Moon,[299] who stated that he "would not advise an investor to take such estimates [as Shannon's] into account in arriving at a proposed purchase price." Moon (S) (Jan. 30, 1980) at 88. Without going into exhaustive detail, EL's opening brief placed Moon in a state of nearly total eclipse. No investor had ever asked Moon's advice on such a question. He had no opinion whether Shannon's results were right or wrong; his sole point went to Shannon's methodology, which he erroneously conceived as being a mechanical application of the average results of Wyer Dick predictions of savings in five other railroad consolidations.

The GPs' reply brief made scant attempt to remove the shadow. Rather it dwelt upon the somewhat semantic question whether Shannon had or had not used a "formula" based on earlier Wyer Dick studies and the need for a sufficiently "property-specific" study.[300] Beyond this the GPs rely on statements by their financial witnesses, Jones and Smith, both of First Boston Corp., as to the uncertainties of projected merger savings, Smith (S) (Aug. 26, 1980) at 2166-67 (by Jones), 19 GP Supp. App. at 433-34; Smith (D) (Aug. 4, 1980) at 100 *et seq.*, 19 GP Supp. App. at 5, and 19-51, and to more extreme positions taken in extracts from a number of official sources. However, as pointed out in EL's reply brief, ELRB at 106, these extracts do not make clear whether they were directed at savings of overhead, which constituted the

bulk of Shannon's estimate, as distinguished from operating savings, which admittedly are more difficult to predict with accuracy.

In support of Shannon's estimates, EL brought out, 1 ELF at 349-53, that in the two of the three mergers that had been consummated substantially in the form that Wyer Dick had studied,[301] the projected consolidation savings had actually occurred. Lamphier, President of the Burlington Northern, stated that Wyer Dick's estimate of the consolidation savings in the Burlington-Great Northern-Northern Pacific merger had been achieved, and indeed surpassed. Lamphier (D) (June 19, 1980) Ex. 12, El App. H at 76-77. Likewise, Shannon testified that Wyer Dick's estimate of the savings on the Erie-Lackawanna merger had ultimately been surpassed. The record with respect to the Seaboard Airline-Atlantic Coast Line merger was not quite so clear. However, the impact of the ICC report relied upon by the GPs, in which the ICC reduced Wyer Dick's estimate of annual consolidation savings by 50 percent, *Seaboard Airline R. Co.-Merger-Atlantic Coast Line,* 320 I.C.C. 122, 154-59, *supra*, was effectively blunted when EL brought out that the Commission's refusal to take account of some of Wyer Dick's estimated savings did not concern consolidation savings but rather savings from abandonments for which the carrier had ultimately decided not to seek authority. *Id.* Except for these the Commission noted that "most of the prospective savings appear to be fairly realistic and generally attainable". *Id.* at 156.302.

We do not say that an acquirer of EL would have accepted Shannon's estimate of consolidation savings at [illegible] value, to be taken as the word of God without debate. Very likely, in the real world, an acquirer would have attempted to make its own estimates if EL had been willing to cooperate and time permitted.[303] Consolidation savings, like everything else in the estimates, would have been a subject of bargaining. What we do conclude is that a purchaser would have regarded Shannon's findings as a reasonable estimate of consolidation savings.

Appendix H

Before leaving the general subject of EL's revenue and expense studies and turning to two other important aspects of EL's case, we think it desirable to emphasize one factor that gives us considerable confidence in Shannon's results. This is the number of positive factors that Shannon did not seek to quantify and include in his pro forma statements. He listed twelve of these, Shannon (S) (EL) (Dec. 31, 1978) at 71; we quote only the first seven:

> (1) Traffic the acquirer would lose if EL and the other bankrupts were shut down;
>
> (2) Traffic the acquirer would lose if the acquirer did not acquire EL, or a comparable Penn Central line, and competitors of the acquirer made such acquisitions;
>
> (3) In the case of the Western line acquisitions, traffic diversions from other carriers to either the lines acquired or the lines of the acquirer or both;
>
> (4) In the case of the Chessie acquisitions, diversions of existing Chessie interchange traffic with lines other than the acquired lines;
>
> (5) In the case of the Chessie acquisitions, the benefits to Chessie of possibly withdrawing from Canada;
>
> (6) Reductions in EL and EL-LV car hire deficits resulting from investment in additional freight cars, improved utilization, and increased length of haul;
>
> (7) Net revenue gains on traffic formerly handled by Penn Central but rerouted over EL and LV because of Penn Central's projected abandonments; . . .

Item (6) is of particular importance. It was a recognition of this problem, it will be recalled, see p. 254 & n.282, *supra,* that attracted Darling's attention to El and led him to make his study for Santa Fe. El amplified these points in its opening freight

brief, 1 ELF at 109-14, and we find no sufficient answer to them in the GPs' reply.

3. *The Addition of $100,000,000 to Reflect a Grant by the State of New York*

EL contends that the price payable for its freight lines for continued rail use should reflect a $100 million grant that the State of New York allegedly would have been willing to give to a purchaser in order to assure the continuation of El's freight service across the Southern tier of that State. Its witness, Shannon, included the $100 million in his first year's projected cash flow. Shannon (S) (EL) (Dec. 31, 1978) App. 1B, 2B, 3B, 4B. Although EL's contention was made in the context of attempting to "bridge the gap" between the capitalized earnings of the various EL or El-LV proposals and the higher net salvage value claimed by El, El urges more generally that a purchaser on a capitalized earnings basis would bid higher if part of its payment would be financed by a third party without cost to it.

Mere statement of the argument reveals its legal difficulties. EL is seeking, in effect, to have the prospect of financial aid from a state to a purchaser considered as property of the seller within the scope of the just compensation clause. It seems questionable from a constitutional standpoint whether a state's display of generosity can increase the bill of the United States in a federal condemnation. Beyond this since New York's payment, as recognized by EL's witness Young, Young (D) (July 19, 1979) at 161-62, 21 GP Supp. App. at 739-40, would be for the "social value" of EL's rail service in New York, it is arguable that recognition of the grant as enhancing the purchase price would violate the rule that value to the taker is not a proper element for consideration. We find it unnecessary to answer these intriguing legal questions, however, since analysis of the facts shows that New York's offer was by no means so unequivocal as El contends. *Cf.* note 220, *supra*.

Appendix H

El's case rests on the testimony of its witness, Louis Rossi, Director of the Railroad Division of the New York State Department of Transportation. This must be considered along with the testimony of GP witness Raymond Schuler, who at the relevant period was New York Commissioner of Transportation and thus Rossi's superior.

Rossi was Vice Chairman of a task force which New York created in 1972 to deal with the developing rail crisis. Prior to the discussions leading to the Rail Act, the task force was discussing with profitable railroads the possibility that they might acquire with state assistance the two principal lines across New York, PC's (formerly New York Central's) water level route and EL's route across the Southern Tier, both of which the State deemed essential. The prospect of a federal solution, beginning early in 1973, put a temporary stop to these discussions. However, the possibility that New York might make some contribution to preserving the Southern Tier route was renewed when the El reorganization court decided in 1974 that EL should not be reorganized under the Rail Act, *In re Erie Lackawanna Ry.*, 393 F.Supp. 352 (N.D. Ohio 1974), a decision that was not appealed to this court. The task force opposed a plan of the EL Trustees to improve EL's Scranton line and to single-track and downgrade the Port Jervis line. A principal reason for this position was the belief that the Port Jervis line was essential to a reopening of the Maybrook gateway and rebuilding of the Poughkeepsie Bridge so as to permit competitive service between the west and New England, and also with New York City by land rather than by car float. Since the Port Jervis line alone would be inadequate, the task force advocated use of the LV line from Waverly and abandonment of EL's Scranton line. Rossi (S) (Dec. 31, 1978) at 4.

On April 1, 1974, Governor Malcolm Wilson approved the Rail Preservation Bond Act of 1974, 1974 N.Y. Laws, c. 118, N.Y. Transp. Law App. 6. The Act provided for a funded $30 million essential rail services preservation program and a $250 million bond sale, subject to approval by a referendum, which was

obtained in the November elections. Later the legislature appropriated $107,500,000 of these funds, $62.5 million of which was for the improvement of upstate freight services. Rossi (D) (Mar. 9, 1979) at 92, El App. A at 154.

In April 1975 the task force made known to USRA New York's willingness to offer substantial financial inducements to profitable railroads to acquire EL's Southern Tier route. Rossi (S) (Dec. 31, 1978) Ex. 6. It also renewed its earlier contacts with potential acquirers of the Southern Tier route, particularly Chessie. Chessie's first concern was with state and local property taxes. It wished to be sure that the 80 percent reduction that had been available to EL because of poor earnings would also be available to it; legislation to that end was adopted, Rossi (S) (Dec. 31, 1978) at 7. Chessie also wished exemption from the remaining 20 percent, and Southern Tier mayors and legislative leaders agreed to support this. *Id.* Finally, according to Rossi, "we made clear that the State had available under the Rail Preservation Bond Act substantial funds to facilitate acquisition of the Southern Tier route", which "would have been in the form of grants and could have been used for acquisition costs as well as rehabilitation". *Id.* Rossi asserted that "[o]n several occasions we specifically offered up to $50 million if Chessie were to make the acquisition proposed in the Final System Plan and an additional $50 million if Chessie were to gain access to New York City". *Id.*[304]

Schuler's testimony has a quite different flavor. While not denying that New York might have furnished financial aid to an acquirer of EL's Southern Tier line, he stated that he did not consider making a direct grant of $100 million, or any other amount, to finance acquisition costs. Schuler (S) (Nov. 1, 1979) at 25-26. Rather, any moneys advanced would have been for "a program of projects and *not* a direct grant for acquisition". *Id.* at 25. These advances might have been traditional loans, loans repayable out of revenues generated by the project, or outright grants. *Id.* at 26. Whatever the form, "we would have

insisted that the Port Jervis line remain as a main east-west freight line and that the projects to be financed were to supplement and not to substitute for the basic maintenance and rehabilitation that a purchaser would have undertaken on its own."[305] Insofar as the testimony of the two witnesses differs, we must follow that of Schuler, who was Rossi's superior and would have had to approve any action taken.

EL has attributed to the State of New York a certainty that was not there. There was no guarantee that New York would supply $100,000,000 or even $50,000,000, see note 304, *supra,* to a purchaser of EL's line through the Southern Tier. The most that can be said is that an acquirer of that line could have looked forward to a warm reception from New York's Department of Transportation and could have expected favorable treatment if it sought financial aid for new capital projects in the State. This is a far cry from EL's argument that, because of a New York "grant", an acquirer would have bid $100 million more than it otherwise would. We thus have no occasion to address the legal problems listed at the outset of this discussion.

4. *Consequences to the EL-LV Earnings Case of Our Rejection of the Joint Terminals Concept*

Our holding that public bodies would not have purchased the EL's and LV's JT properties does not necessarily entail rejection of their earnings cases. As already noted, both EL and LV submitted evidence that assumed that private acquirers would have purchased their properties in NJ/NYTerm. EL, for example, claimed that the value of its properties alone to a Western acquirer would have been $225 million, Young (S) (Dec. 31, 1978) at 22, and LV, assuming an acquisition by a large Eastern carrier, claimed a value of $75 million for its lines. LV at 56. Moreover, EL and LV witnesses testified that the viability of a combined EL-LV configuration would not have been dependent on the existence of the NJ/NY Terminal. Shannon (S) (EL)

(Dec. 31, 1978) at 39-40; Adik (S) (EL) (Dec. 31, 1978) at 8, and the two Ts have so contended in their briefs and arguments.

This leads, however, to another problem. EL's evidentiary submission did not explicitly calculate the earnings value of an EL-LV combination based on the assumption that the purchaser would have acquired the EL's and LV's lines in the NJ/NYTerm in addition to their main freight lines (hereinafter the EL-LV without JT). In its June 1, 1981 Statement, EL did give a rough indication of the earning power of an EL-LV without JT proffer. The EL calculated that "annual traffic study net operating income" would increase by $6,777,000 in the case of a Western line, and by $6,748,000 in the case of a Chessie acquisition of EL-LV. These figures do not account for rehabilitation costs. The EL claimed that the asking price for the EL-LV would have increased by $78 million if their JT properties were included. This figure is based on the claimed salvage value of the EL-LV properties in the JT rather than on the capitalized value of the increase in earnings attributed to the EL-LV without JT proffer. Statement of the Erie Lackawanna Trustees in Response to the Court's May 21, 1981, Memorandum (June 1, 1981) at 8-9. Sp. Ct. Rep. at N 35807-08.

In a letter to the parties dated June 19, 1981, Sp. Ct. Rep. at N 36204, the court requested EL to give a detailed breakdown of the projected earnings and cash flows of the EL-LV without JT proffer including the costs of rehabilitation. This statement shows that, including rehabilitation expenses as projected by EL's and LV's witnesses, the net gain to the acquirer of the EL-LV without JT combination would be roughly $4,000,000 annually.[306]

In response to the EL's filing, the GPs take the position that the court should be "loathe" to rely on the EL's new figures. They first contend that:

> The transferors' submissions implicitly and explicitly advance many entirely new factual contentions which are not subject to judicial notice. They are not supported by

> any testifying witness, nor have they been subjected to cross-examination or to evidentiary rebuttal. . . . It would thus be unfair for the Court to rely importantly on [these] new contentions. . . .

Government Parties' Response to July 10, 1981, Filings of EL and R Regarding Earnings Values Without JTs, (July 24, 1981) at 20-21. Sp. Ct. Rep. at N 36364-65.

The court finds little support for this argument. First, as has already been noted, the idea of an EL-LV without JT configuration did not come out of thin air — two EL witnesses discussed this configuration in their statements. What did not appear in those statements are numerical estimates of the earnings power of the EL-LV without JT proffers. But a review of the workpapers underlying EL's July 10, 1981, submission readily reveals that the calculation of the earnings value of the EL-LV without JT configuration was a straightforward development of figures that are in the record and which have already been subjected to discovery, cross-examination, and rebuttal testimony. For example, the key component in EL's analysis is the substitution of EL's and LV's own operating costs in the JT area for those derived in the JTs study. EL's and LV's own operating costs were taken directly from Jennison's studies of the independent proffers. The GPs had ample opportunity to challenge these figures.[307]

What admittedly is different in the EL-LV without JT case is the way in which the figures in the record were used. But, again, we do not think that the GPs were prejudiced by this case. Given that the court believes that an EL-LV without JT acquisition would have been the most likely outcome in the alternative scenario and that all of the numbers that the court would have needed to adjust the EL-LV with JT acquisition to eliminate the effects of exclusion of EL's and LV's JT freight properties can be found in the record, there is no reason why the court could not have taken it upon itself to attempt to make the appropriate adjustments. If the court had chosen this course, it would still have had to rely on

the parties to provide it with information from the workpapers. Undoubtedly, we would have heard objections, either from the GPs, EL-LV, or both, that the court erred in its calculations. Rather than pursue this course, the court chose to seek the aid of the parties in its calculations. We cannot see how the GPs can legitimately complain that they were prejudiced by this procedure.[308]

Apart from attacking the propriety of our considering the EL-LV without JT configuration, the GPs also argue that EL's contention is, as a matter of fact, simply implausible. At the heart of EL's claim that the earnings value of the EL-LV without JT proffer would be greater than that with NJ/NYTerm is evidence showing the EL's and LV's own historic costs of handling traffic in the terminal areas were lower than the costs projected in the JTs study.[309] Yet, as the GPs point out, the entire purpose of the JTs was to achieve major savings through the consolidation of redundant facilities. Citing a 1973 PC report that concluded that "terminals will continue to be a major expense and a major operating headache" and that relief could only come from the expenditure of "massive funds" and the rearrangement of facilities, the GPs state that "[t]he transferor's contention now that unconsolidated operations could have been run at (or below) the costs of consolidated terminals is nonsensical", 2 GPRB at L42.

At oral argument counsel for the JTTs attempted to explain this seeming anomaly. First he contended that because the projected JTs costs were based on averages for all of the carriers in the terminal areas and because EL's traffic was of a type that was generally cheaper to handle, when the averages were computed "the Erie came out somewhere on the wrong end of the stick", Tr. at 532-33. He also argued that EL's costs for its non-JT traffic in the EL-LV without JT acquisitions improperly reflected the arguably higher costs in Northern New Jersey because the non-JT traffic costs were calculated on the basis of system-wide average costs, which included the cost of traffic in the North Jersey area. *Id.* at 526-32.

While these two factors certainly could explain the seeming anomaly, the court is reluctant to base its conclusions on what, after all, are speculations. Although we could independently explore the record further to confirm or refute these theories, this would be a most difficult task without the aid of counsel. This does not mean, however, that the total cost figures for the EL-LV without JT acquisition cannot be accepted. Indeed, we think that, subject to a few important exceptions noted in this opinion, we can be rely on them for the simple reason that the total cost figures for the EL-LV without JT acquisitions are derived directly from the system-wide, historical average cost figures calculated by Jennison for EL and LV. Apart from a few problems, which will be discussed later, the GPs give no reason why Jennison's figures cannot be used in this way. Indeed the GPs' major criticism of the entire JTs study — that it is an artificial construct which ignored the historical operations and costs in the JT areas — is a strong argument in favor of using Jennison's figures. Jennison made his calculations directly from actual expenses incurred by EL and LV. And as already discussed, see pp. 262-65, *supra*, we reject the limited criticisms levelled by the GPs at Jennison's study.

The GPs do, however, make one relatively major criticism of the actual calculations contained in EL's July 10 submission. The NJ/NYTerm operating plan provided that CNJ's main line, which previously carried both freight and passenger traffic, would have been dedicated solely to passenger use. CNJ's freight traffic was thus rerouted over the NJ/NYTerm freight lines. Whatever the merits this routing decision may have had assuming that NJ/NYTerm would have been created, when that assumption is abandoned any possible justification disappears. Without a wholesale public acquisition of all of the Ts' Northern New Jersey properties, there is no reason to suppose that a private acquirer of EL-LV would have been able to divert to its own line all the traffic historically carried by CNJ. Accordingly, in a letter to counsel dated September 4, 1981, Sp. Ct. Rep. at N

36853, the court asked the parties to adjust the figures contained in EL's July 10 submission to reflect this.[310]

B. *Ann Arbor*

As previously stated, Part II, p. 25, *supra*, AA, a 99+ percent owned subsidiary of D,T&I, itself a 99+ percent owned subsidiary of PC, as operated in 1973, extended from Toledo, Ohio, in a generally northwest direction, to Ann Arbor, Michigan, and thence across Michigan to Frankfort on Lake Michigan, where car ferries were operated to Manitowoc and Kewaunee, Wisconsin.[311] The 54-mile Toledo-Ann Arbor segment (sometimes hereafter "the segment") was believed to be profitable, the balance of the line to be a producer of deficits.

The FSP designated the Toledo-Ann Arbor segment[312] to Conrail and an 86.5-mile stretch of line between Durand and Ashley, Michigan, to the Grand Trunk Western. The balance of the AA was not then designated for conveyance.

Prior to promulgation of the FSP an Inter-Agency Task Force appointed by the Governor of Michigan in May 1973 had expressed concern in a report dated January 2, 1975, over expected loss of rail service as a result of pending abandonments and the proposals with respect to AA probable in the FSP, and had advocated the State's assuming a positive attitude. The report recommended that main lines such as AA's should be considered the backbone of the State's railroad system and expressed concern that the expected designation of the Toledo-Ann Arbor segment to Conrail in the FSP would preclude the State's using profits from that segment to cross-subsidize the losing line north of Ann Arbor. The report led the Michigan legislature of 1975 to adopt a number of statutes giving the State extensive power to purchase and operate railroads.

Among the 1976 amendments to the Rail Act was a provision, § 208(d)(2), authorizing USRA, upon petition of any State, to make further designations under the FSP for conveyance, *inter*

alia, to a State. On February 11, 1976, Michigan petitioned USRA to redesignate all of AA's properties for conveyance to the State. USRA granted this petition to the extent of redesignating the Toledo-Ann Arbor segment to Michigan instead of Conrail and also designating to the State the segment between Ashley and Cadillac. USRA also adopted a resolution recommending that the Grand Trunk Western grant trackage rights to the State over the segment designated to it, see *Michigan Interstate Co.* v. *Grand Trunk Railroad Company*, 459 F.Supp. 1008, 1010 n.2 (Sp. Ct. RRRA 1978). In 1980 Michigan purchased all of AA's remaining properties.

The trustee of AA claims that Michigan would have purchased the Toledo-Ann Arbor segment for $9,690,193. Although this figure must be subjected to downward adjustment, we conclude that the Toledo-Ann Arbor segment would have had substantial capitalized earnings value to at least two railroads and would have been purchased in the absence of the Rail Act either by the State of Michigan or by one of the two railroads at a price slightly higher than the lower of the two capitalized earnings values.

1. *The Position of the State of Michigan*

Although in our view it does not particularly matter whether the purchaser of the segment would have been the State or a railroad, we begin by discussing arguments of the GPs that the State would not have been an acquirer. We have thought it preferable to treat this separately from our general discussion of public body purchases, Part XI, because the situation differs in a number of important ways. First, only freight lines are at issue. Second, since AA's earnings value studies for its allegedly profitable Ann Arbor-Toledo segment did not include any traffic originating on the unprofitable northern segment, the GPs' arguments we accepted in concluding that the JTs' freight lines would not have been purchased by public bodies and that prices paid for passenger lines would reflect deductions for the earnings those

lines contributed to the privately acquired lines are inapplicable.[313] Third, AA claims no premium in excess of X for its conveyed Ashley-Cadillac segment. Finally, as will appear, there would have been a number of railroads that would have bid for AA's Ann Arbor-Toledo segment. As a result, all we need here consider is whether Michigan would have had the inclination and financial capacity to purchase AA's Ann Arbor-Toledo segment or, perhaps, since Michigan's interest lay in the preservation of the whole of Ann Arbor, the entire Ann Arbor rail line, in the absence of the Rail Act.[314]

Relatively little evidence on the position of the State of Michigan in the absence of the Rail Act was or perhaps could be offered by either party. The bulk of AA's argument is based upon what actually transpired in the presence of the Rail Act, under which Michigan ultimately acquired AA's entire system. In the absence of the Rail Act, Michigan also would have been concerned about the future of PC's lines in the State. On the other hand, acquisition of the Ann Arbor-Toledo segment in the alternative scenario would have been at a price AA contends to be substantially higher than the actual price paid by the State under the Rail Act, and the purchase would have had to have been effected without federal assistance that explicitly was part of the federal response to the rail crisis. See 2 GPRB at Q 5 n.7 (use of federal assistance in State's purchase); pp. 216-17, *supra*, (limits upon consideration of federal finance). Also, the profits from the southern segment would not have been available to cover losses on the rest of the system if Michigan, rather than obtaining the southern segment at a bargain price under the Rail Act, would have had to pay the full capitalized earnings value to avoid its acquisition by prospective solvent acquirers.[315]

The GPs are probably correct in arguing that Michigan would not have acquired the entire AA unless there were no alternatives. 4 GP at R 165-66. But, aside from the argument that the ICC would have conditioned the sale of the southern segment upon inclusion of part or all of the lines to the north, a question we have

above decided in the negative, Part X, pp. 188-91, *supra*, the GPs indicate no other possible acquirer of the northern lines. Michigan's efforts in the presence of the Rail Act to get Conrail or solvent railroads to bear the burden, 4 GP at R 167-72, are hardly surprising but are not necessarily indicative of what Michigan's actions would have been in the absence of the Rail Act. The State's unwillingness to acquire or operate rail lines prior to enactment of the Rail Act, 4 GP at R 174-75, is likewise not probative since this does not indicate its probable response when faced with a rail crisis. After all, Michigan did enact legislation permitting acquisition and operation of railroads when confronted with the possibility that lines in the State would not be included in Conrail, AA at 6-16, and its study of the State's railroad network and prospective abandonments began in June 1973, prior to enactment of the Rail Act. Petition for the Amendment of the Final System Plan, VII 17 at 2. The importance of the AA to the state was adequately documented. See *id.* at 5-11. Our review of these material indicates to us an attitude toward the State's acquisition of AA entirely different from that of the northeastern states whose heavy financial involvement in supporting commuter traffic made them allergic to further expenditures for freight lines, whether for capital or operating expenses, see Part XI, p. 204, *supra*.[316]

Michigan's financial capacity is not seriously questioned. AA claims that the Motor Vehicle Highway Fund would have been available, for example, by using it to retire special obligation indebtedness, which, by contrast to general obligation bonds, did not require electoral approval. The GPs correctly indicate that the Motor Vehicle Highway Fund was to "be used exclusively for highway purposes as defined by law". Mich. Const. 1963, Art. 9, § 9. But in 1977, the Michigan Supreme Court upheld the legislature's definition of "highway purposes" as including the acquisition of rail properties. *Advisory Opinion on Constitutionality of 1976 PA 295 and 297*, 401 Mich. 686, 707, 259 N.W.2d 129, 137

(1977). There is no reason to doubt that the legislature's definition would have been accepted by the same court in the absence of the Rail Act. In any event, the GPs offer no persuasive evidence suggesting that Michigan would have been unable to raise the necessary funds from any of a number of traditional revenue sources.[317]

We thus conclude, although again emphasizing that the issue is not of real importance, that Michigan would have sought to acquire the Ann Arbor-Toledo segment and, indeed, the whole of AA.

2. *Competitive Bidding*

Shannon, testifying as a witness for AA, considered D,T&I as the most likely railroad to have acquired the Ann Arbor-Toledo segment. The primary reason he gave was that the acquisition would have afforded D,T&I an improved route into Toledo, which, despite its name, it did not reach directly but only by trackage rights. Shannon (S) (AA) (Dec. 31, 1978) at 4. However, as the discussion of off-segment revenues developed, improved access of D,T&I to Toledo emerged as a rather minor factor; the important point became that if the Ann Arbor-Toledo segment were acquired by another railroad, D,T&I would have been subjected to substantial traffic diversion. When AA was under D,T&I control, traffic was routed to give the maximum haul over the AA-D,T&I system even if this shorthauled AA. A solvent railroad purchasing of AA's Ann Arbor-Toledo segment would have followed the same policy of obtaining the long haul for its own combined operation, with serious adverse consequences to D,T&I.[318]

The GPs make several answers to the claim that D,T&I would have been a bidder, but we do not find these persuasive. One is the testimony of the AA Trustee that when D,T&I placed AA in bankruptcy, a D,T&I official stated that "they had put their last penny in the Ann Arbor and they were not going to take any

further bath." Chase (D) (June 29, 1979) at 9, 9 GP Supp. App. at 509. This testimony, however, related to what D,T&I would do for AA as a system, subject to the claims of creditors, not to what it would do by way of acquiring the Toledo Ann-Arbor segment free of debt, particularly if it were faced with prospects of the latter's abandonment or sale to a competitor. As we shall see later, a purchaser of all the IFLs or an acquirer of the Detroit-Cincinnati IFL, which might be Southern, Louisville & Nashville, Chessie, or Norfolk & Western, Shannon (S) (PC) at 36-37,[319] or Norfolk & Western even if it did not acquire the Detroit-Cincinnati IFL, Shannon (AA) (S) at 4, would have been possible acquirers.

The GPs' third ground for attacking the premise that D,T&I would have feared diversion is that "carriers cannot dictate routings". Sullivan (S) (Traffic on the AA) (Nov. 1, 1979) at 5. While it is true that if a shipper explicitly directs that his traffic be transported over an established through route, the carrier is legally obligated to follow the shipper's instructions, 49 U.S.C. § 10763, AA argues convincingly that the carrier serving a shipper's plant is peculiarly able to influence the shipper, assuming cost and service are equal, to route traffic so as to give that carrier the long haul or leave the routing to the carrier, which would have the same result, AA at 61-65.[320] Doing this costs the shipper nothing and enhances the carrier's zeal to give good service and respond to complaints.[321] It is true that an acquiring carrier will not ordinarily be able to divert 100 percent of the traffic susceptible to diversion, but D,T&I would have been sufficiently disturbed over the threat of substantial diversion to wish to keep the Ann Arbor-Toledo segment for itself.

AA also made a convincing case that there would have been at least one other bidder, namely, an acquirer of one of PC's IFLs. We deal initially with the GPs' claim that it is impermissible for us to consider the acquirer of any or all the IFLs as a potential bidder since there is no assurance that any of the IFLs would have been acquired. Apart from the considerations set forth in Part

III of this opinion relating to the GPs' refusal to take a stand with respect to the continuance of any IFL in rail use, see pp. 28-29, *supra*, we believe there is sufficient evidence in the record to show, at least in the absence of contradictory proof by the GPs, that the IFLs would have remained in service, although they might not necessarily have commanded the prices proposed by PC. In addition to the general statements by James McClellan, USRA's former Director of Strategic Planning; Frank Barnett, former Chief Executive Officer of Union Pacific and a vigorous sponsor of the Rail Act; USRA's consultants, Temple, Barker & Sloane; and the Rail Services Planning Office of the ICC, see AARB at 15-17, the evidence presented by PC, notably the testimony of witnesses Hallingby, Jennison, and Myers, sufficed in the present context to meet the burden imposed on page 5 of our order of December 5, 1980, immediately after PC's settlement, that "to the extent that any of [the Ts'] proposals for continued operation of their own lines hinge on continued operation of lines of PC, they have the burden of showing that such lines would in fact have continued in rail use". Sp. Ct. Rep. at 23424.

When we turn to the facts, we find that such difficulties as AA faces are largely semantic. AA witness Laurie[322] said in his initial statement:

> Penn Central was recognized as a likely purchaser of the segment by reason of its Chicago-Detroit route, Detroit-Cincinnati route, and its interchanges with the Ann Arbor at Toledo and at the City of Ann Arbor. Although a sale of the Penn Central system to a single buyer assuming no Rail Act would have been extremely doubtful, I nevertheless concur with Mr. Charles Shannon's testimony that a buyer of the Detroit-Chicago route or the Detroit-Cincinnati route or both would indeed have been a likely purchaser of the Toledo to Ann Arbor segment.

Laurie (S) (AA) (Dec. 31, 1978) at 2. The difficulty springs from the reference to the Chicago-Detroit route. Although acquisition of AA by an acquirer of that route alone presumably would have afforded some opportunity to divert traffic between points on the Ann Arbor-Toledo segment and the west which AA had interchanged with Norfolk & Western at Milan, Michigan, apparently the bulk of the diversion would have been of southbound traffic previously exchanged with D,T&I at Diann, see note 318, and would have enured to the benefit of IFL lines east of Toledo to Potomac Yard; an acquirer of the Chicago-Detroit IFL would have derived no benefit from this although the assumed acquirer of all the IFLs would have.

In his rebuttal testimony, Laurie submitted a Study of Southern Railway Acquisition of the Toledo-Ann Arbor Segment of the Ann Arbor Railroad Company. Laurie (S) (Oct. 15, 1980) Ex. 5. In an introductory section he explained that since his earlier report, which had assumed acquisition of all the IFLs by a single purchaser, "it has been determined that PC's scenario contemplates segmentizing that railroad for sale to various potential purchasers." He chose for study the Detroit-Toledo-Cincinnati "zone"; assumed that, as Shannon had testified, Shannon (S) (PC) (Dec. 1, 1978) at 36-37, Southern would have been a likely purchaser of that "zone", and further assumed that, having made that purchase, Southern would have been a bidder for the Ann Arbor-Toledo segment.[322] This showed even higher earnings than the study made on the assumption that the bidder would have been a single acquirer of all the IFLs since in the Southern study, off-segment revenues included not only those on the acquired IFL, as had been the case with his initial study, but on Southern's own lines south of Cincinnati.

We thus conclude that, assuming for the time being the correctness of Laurie's figures, there would have been two railroad bidders for the segment and that Michigan would have had to pay somewhat more than the lower of the two capitalized earnings values.

This last statement warrants elaboration. It is clear, from what has been said in Part V, that if two railroads were the only bidders for a T, the road to which the T would be more valuable would need to bid only somewhat more than the other; hence the lower of the two capitalized earnings values determines the outcome. AA seems to argue that its case is different because there were three potential bidders, not two. If the third bidder were a railroad, AA would be right; the third railroad would have had to bid more than the capitalized earnings value to the higher of the two others, not the lower. But here Michigan had the power to condemn all the Ann Arbor-Toledo segment, except for the few miles between the Ohio-Michigan boundary and Toledo, which AA surely would have been willing to sell at a reasonable price if the rest of the segment were condemned. In a negotiated sale, therefore, Michigan would not have paid more than what it would have had to pay if it resorted to condemnation. See Part XI, pp. 233-37, *supra*. In such a condemnation, the market value would have been only what AA could have obtained from the railroad having the greater interest in the segment and that, as we have shown, would have been only somewhat more than what would have been paid by the next lower.

3. *The Extent to Which Off-Segment Earnings Should be Taken into Account in Determining Capitalized Earnings Value*

Laurie's estimate of the value of the segment to Southern depended heavily on added earnings Southern would achieve on the acquired Detroit-Toledo-Cincinnati IFL and on its own lines from traffic originating or terminating on the segment that had not heretofore moved over these lines. His estimate of the value of the segment to D,T&I depended heavily on the retention of earnings on D,T&I that would be diverted if the segment passed into the hands of a purchaser of all the IFLs. The GPs object to inclusion of such amounts on a number of grounds.

We have already largely disposed of the first of these, namely, that traffic cannot be diverted since routing rests in the control of the shipper. What remains to be determined is what proportion of the divertible traffic would in fact have been diverted. Recognizing that "[t]he assumption that PC could control 100 per cent of the interline competitive traffic may not be entirely realistic", Laurie (S) (AA) (Dec. 31, 1978) Ex. 1 at 5, Laurie's study of the value of AA to a purchaser of all the IFLs made separate estimates on the basis of 100, 90, 85, and 75 percent control. He followed the same course in his Southern study. There was no need for doing this in the D,T&I study since this was based on historic movement of the traffic. AA's translation of the earnings into capitalized value used the 100 percent figure. We have no real basis for choosing among the figures except that we join Laurie in believing that 100 percent is too high. Since some figure must be chosen, we take the most conservative and opt for 75 percent.

The GPs argue also that earnings should never be counted save on the line on which they are earned. This would be true enough if we were dealing with a study of the overall level of railroad earnings or with segregation studies of the sort that figured prominently in railroad reorganizations of the 1940's, since earnings should not be double-counted. However, we see no reason why if a railroad believes that an acquisition will funnel new profitable traffic over its lines, it would not take that profit into account in making a bid. What must be avoided is not counting off-segment earnings but double-counting them.

The GPs assert that the latter has occurred, but we find AA's response convincing. Southern would not have been interested in acquiring the Ann Arbor-Toledo segment unless it was sure it had acquired the Detroit-Cincinnati IFL, for which, as pointed out, it could well have faced competitive bidding from the Louisville & Nashville. In bidding for the Detroit-Cincinnati line, it would not have known whether it would succeed in acquiring the Ann Arbor-Toledo segment since it would have faced bidding from

D,T&I and the State of Michigan. Hence it would have been irrational for Southern to include added earnings from acquisition of the segment in its bid for the Detroit-Cincinnati line.[324] Beyond this Laurie testified in rebuttal, Laurie (S) (Oct. 15, 1980) at 9, that, as suggested by the GPs' witnesses, Allen & Kozu (D) (Aug. 21, 1980) at 1040-41, 1 AA Supp. App. at 37-38, he had contacted PC's valuation witness Wilmot, who advised him that when PC submitted its earnings estimates on December 1, 1978, a month before Laurie's testimony was filed, it had taken no account of any additional traffic that might be received from the Ann Arbor-Toledo segment.[325]

4. *American Motors Jeeps*

Many pages of brief have been devoted to the question whether AA would have continued to receive revenue from jeep traffic from an American Motors plant on Stickney Avenue in Toledo. The jeeps were manufactured at a plant located on Cove Avenue, which was served by PC, but PC's tracks were incapable of handling the type of bi-level cars needed to ship the jeeps. Hence these were trucked to the American Motors parts plant on Stickney Avenue, which was adjacent to AA's southern terminus at Ottawa Yard.

The Stickney Avenue plant was served by six tracks, all set up by AA and to all of which it had access. PC had access to Tracks 5 and 6, but these were suitable only for the delivery of coal to the plant. Tracks 3 and 4 were used for loading boxed jeeps for export and Tracks 1 and 2 were used for loading jeeps aboard bi-level freight cars for domestic shipment.

GPs witness Sullivan testified, Sullivan (S) (Traffic on the AA) (Nov. 1, 1979) at 6-7, that neither a PC acquirer nor D,T&I would have paid for revenues from the Stickney Avenue plant since AA had no control over the traffic and could have lost it at any time. He also said, *id.*, that a PC acquirer could have adjusted its tracks serving the plant so as to give it full access to

Tracks 1 and 2 and serve the jeep traffic. GPs witness Klick added, Klick (S) (Revenues Associated with AA) (Jan. 30, 1980) at 5, that D,T&I could have obtained access to the plant through reciprocal switching over PC if AA went out of business.

AA's broadest answer is that if these changes could be made now, they could have been made years ago but were not,[326] and that this indicates there must have been a good reason for not doing so. It finds the reason in American Motors' desire to have all movements of jeeps at the Stickney Avenue plant under the control of one carrier, to wit, AA. It claims this situation would continue so long as it stayed in business and points out that the GPs have not claimed that the Ann Arbor-Toledo segment had no earnings value. Hence, it argues, American Motors would not have consented to the "adjustment" of the PC tracks, which were located on American Motors' property, or in any way encouraged PC's competition for the jeep traffic.[327] With respect to D,T&I AA calls attention to the limited nature of Klick's testimony, namely, that D,T&I could have obtained access by reciprocal switching over PC's lines if AA had ceased operation, which AA claims would not have happened, and not that D,T&I could have obtained access by reciprocal switching over AA. It also complains about the GPs' failure to introduce the reciprocal switching tariff in evidence, and questions the value of access by D,T&I to the Stickney Avenue plant since D,T&I's only access to Toledo was by trackage rights over AA.

The situation is a confused one, all the more so because of the failure of anyone to call any official of American Motors. The claim that traffic of a particular shipper would be wholly or partly lost to a T that had long handled it, solely because other carriers would increase their efforts to get it, is surely one on which the GPs had the burden of proof. We think they did not carry it.

Appendix H

5. *The Cost of Handling Off-Segment Traffic*

Having determined what off-segment traffic would accrue to an acquirer of the segment, Laurie then had to estimate the costs of handling it. For this he utilized a study prepared by Edward Jennison[328] with respect to acquisition of AA by either a single acquirer of the IFLs or by D,T&I.[329] Based on his judgment, Jennison set figures for variability in the 1973 operating accounts, expenses for net rents, costs of capital (at 8 percent), and taxes of PC and D,T&I. This resulted in a cost-revenue ratio of 75.58 percent, Laurie (S) (AA) (Dec. 31, 1978) Ex. 1, Table 5, Sheet 4, and of 71.68 percent for D,T&I. *Id.* Table 8, sheet 4.[330] In his Southern study, Laurie used the 75.58 percent ratio he had developed for PC for traffic carried on the acquired line north of Cincinnati. Laurie (S) (Oct. 15, 1980) Ex. 5 at 5. However, for the traffic carried on Southern's historic lines he used a figure of 54.56 percent, which was said to "reflect" a special study of the five Class I railroads in the Southern Railway System in 1973. *Id.*

The GPs attack all these percentages as too low, particularly when used to develop earnings that are expected to last forever. They rely not on a detailed criticism of the percentages of variability applied to the particular accounts but to testimony given by the PC's and GPs' opportunity cost witnesses, Kornhauser and Schneider, on the degree to which solvent railroads could recoup revenues lost from PC's abandonment by reducing expenses, including the opinion of some economists that the ratio of long-run variable costs to total costs might be as high as 90-99 percent, which would produce a ratio of long run variable costs to revenue in the range of 85 percent, 3 GP at K 34-36.

In the absence of direct evidence to the contrary, the view that PC could have spread 20,000 added cars of AA traffic over all the IFLs at a ratio of 75.58 percent of added costs to revenues does not seem unreasonable. However, that conclusion does not contribute greatly to a solution since the proffer of a single acquirer

of the IFLs as purchaser of the Ann Arbor-Toledo segment has been withdrawn. With respect to D,T&I, the ratio of the amount of traffic being considered to the railroad's total revenue is, of course, much greater. We would think that on a short run basis, D,T&I would have done exceedingly well to contain the loss of what had been a substantial portion of its traffic to 28.32 percent of revenues. It might have done better in the long run but — apart from Keynes' epigram, which AA refreshingly notes, AARB at 91-92 — long-run savings would be diminished by discount. Also Laurie, in apparent error, failed to take into account that acquisition of the segment by D,T&I would save the latter $168,772 a year in trackage fees, AA at 57 n.2. All things considered, we are not disposed to alter, on the grounds presently under consideration, Laurie's estimate of the capitalized earnings value of the segment to D,T&I.

We have more difficulty with Laurie's estimates with respect to Southern. As a matter of common sense one would suppose that if it would have cost an acquirer of all the IFLs 75.58 percent of added revenues to handle the added traffic produced by the segment, including the long haul of much of the traffic to Potomac Yard, it would have cost an acquirer of the Toledo-Cincinnati IFL a higher percentage of revenues to haul the traffic over that relatively short railroad, with the added traffic constituting a larger proportion of the total. As against this Southern has had a particularly low freight operating ratio, ranking third (on the basis of 1969-73 averages) of the twenty railroads studied by GPs witness Smith, Smith (S) (Jan. 30, 1980) Ex. 17 at 14, with a 1969-73 average of 71.1 percent. On this basis the 75.78 percent figure of added costs to revenues over the Detroit-Cincinnati IFL operated as part of Southern does not seem unreasonable. With respect to the estimate of a 54.56 percent ratio of costs to revenues for added traffic over Southern's own line, the "special study" on which Laurie relied apparently was not produced, but the GPs did not ask that it be. In a sense, moreover, the precise correctness of

Laurie's estimate of earnings for Southern acquisition is immaterial. His estimated capitalized earnings value for this acquisition ranged upward from $11,091,999, assuming a 75 percent degree of control over segment originated or terminated traffic and a 15 percent capitalization rate, Laurie (S) (Oct. 15, 1980) Ex. 5 at 6, as compared with $7,044,280 for acquisition of D,T&I. Laurie (S) (AA) (Dec. 31, 1978) at 11. For reasons heretofore explained, Southern would have had only to top D,T&I's bid.

6. *Use of 1973 Traffic as the Base for Projecting Revenue*

The GPs' opening brief did not directly challenge the propriety of using AA's 1973 traffic as a basis for calculating revenues, except insofar as such a challenge could be inferred from a quotation from a paragraph of the testimony of AA witness Weisman, 3 GP at K 7, that "traffic began to decline again in 1967 and continued to do so for the years thereafter". AA's reply brief is convincing that this testimony referred only to the car ferry traffic, none of which was included in Laurie's estimated revenues, AARB at 77-79.

However, during the cross-examination of AA's rebuttal witnesses, Weisman and Laurie, the GPs introduced, over AA's objection,[331] identical exhibits purporting to show that cement shipments on AA declined substantially from 1973 to 1974 and 1975. In its reply brief, AARB at 80, AA noted that "[a]lthough the Government Parties did not raise the matter at all in their Opening Brief, they may attempt to argue in their reply brief that a decline in traffic would have reduced the amount that a purchaser of the Toledo-Ann Arbor segment would have paid if, as the Government Parties have suggested, the disposition of the segment were to have been delayed several years".

AA's anticipation proved correct; the GPs' reply brief contains several pages, 1 GPRB at I 9-15, dealing with the subject and expanding the argument to include automobile originations from

American Motors' jeep plant, as to which evidence similar to that with respect to the cement shipments had been used in the cross-examination of AA's rebuttal witnesses, and auto parts, mainly from Ford's Salina plant, figures for which had not been presented.[332]

AA objects to consideration of this evidence on a number of grounds. It claims that this material should have been used at the initial cross-examination of Weisman and Laurie, which would have given AA a chance to respond in rebuttal or that, at the least, it should be restricted to Laurie's Southern study which, was the only new earnings material in his rebuttal testimony. It also questions whether the statistics were properly authenticated under F.R.E. 901 and 902.[333]

It surely would have been preferable for the GPs to have made their point on Laurie's initial cross-examination so that AA could have developed explanatory evidence in rebuttal. So far as we can determine, the record contains no figures as to the total traffic on the segment on 1974 as against 1973; for all we know, the drop in cement and auto parts shipments may have been made up by increases in other traffic. Moreover 1974 and 1973 were years of recession, and, AA claims, AARB at 87, that if the contention had been timely raised, it could have proved that shipments increased when the recession ended. All things considered, we are not disposed to give more than slight weight to the GPs' contention.

We thus conclude that D,T&I would have been willing to pay a sum close to Laurie's estimate subject to the downward adjustments noted herein and required by the discussion in Parts VII, VIII, and IX, and that the acquirer of PC's Detroit-Cincinnati segment would have been willing to pay sufficiently more to insure the acquisition.[334]

Appendix H

C. *Lehigh & New England*

We have described the configuration of this small road and the claims of its receiver in Part II H. We now hold that L&NE did not discharge its burden of showing that its Tamaqua branch would have continued in rail use. With respect to its Bethlehem branch, we hold that while this might well have been purchased by Chessie as an acquirer of R's class (a) lines, there is insufficient evidence that Chessie would have faced a competitive bidder. Hence this property also is to be valued at the appropriate version of X.

The sole connection of the Tamaqua branch was with R's Little Schuylkill line. R did not proffer this for continued rail use and classified it as a class (c) line whose future R was unable to predict. It is true, as L&NE argues, that this was not a concession of abandonment on the part of L&NE. However, in its Statement of Position dated May 10, 1978, at 1, Sp. Ct. Rep. at N 10926, L&NE acknowledged that the Tamaqua branch would not have been sold for continued rail use. L&NE had the burden of showing that a connecting line would have existed and did not discharge its burden.

The position with respect to the Bethlehem branch is different. This branch connected with R and LV at Bethlehem, Pennsylvania, and with EL at Bath, Pennsylvania. However, EL's line from Bath to Portland, Pennsylvania, was not designated for conveyance and it connected with a line of EL that would be abandoned in the event of an EL-LV combination. The only possible acquirers thus would have been Chessie as an acquirer of R's class (a) lines and the acquirer of LV.[385] The figures make it plain that neither of these acquirers would have bid for L&NE on the basis of the earnings on the L&NE's own line, which had become negative. The question thus becomes whether L&NE's computation of off-segment revenues is such as to show that competitive bidding would have existed. L&NE witness Storm estimated total off-line revenues of $1,268,434. He assumed the

incremental cost of carrying this traffic would be between 70 and 80 percent. Although in our discussion of AA we have approved recognition of off-segment revenues that could have been diverted (or preserved) through an acquisition, Storm's figures do not show how much off-line revenues that had historically accrued to R could be diverted by a LV acquirer, or vice versa. There was no occasion for him to do so since he cast Chessie as the acquirer of both LV and R. There is thus no record basis for holding that the acquirers of the LV and R would have bid against each other for the purpose of changing L&NE traffic from its historic patterns.

We thus conclude that there would have been no competitive bidding for the Bethlehem branch and that, even if it continued in rail use, the sales price would not have been significantly more than the applicable version of X.

XIII. Central Railroad of New Jersey

CNJ's contentions in this phase of the case are unlike those of any other T. CNJ alleges that, but for the Rail Act, it would have sold its entire rail system to New Jersey for approximately $100 million. It has two ways of reaching that result, however, and it presents what amounts to two separate rail use cases. CNJ's first ("real life") case is unique in this litigation: it attempts to prove a hypothetical sale to the State, based not on speculative contentions about what the State's interests and actions would have been had the Act never been passed, but rather on what the State actually did in the presence of the Act. According to CNJ, it and New Jersey carried on active negotiations that would have resulted in a sale but for the interference of this court in the *180-Day Appeals*, 384 F.Supp. 895. In the event that its "real life" case should fail, however, CNJ has backed it up with a more conventional alternative scenario case—one that assumes that in the absence of the Act the State would have bought CNJ's lines for $100 million.

Appendix H

A. *Central Railroad of New Jersey's "Real Life" Sale to New Jersey*

In 1974 representatives of the State of New Jersey, the federal government, the estate in bankruptcy of CNJ, and some CNJ bondholders discussed on many occasions the prospect of a purchase of some or all of CNJ's properties by the State. According to CNJ, these negotiations made great progress toward an actual agreement during the course of the year, until they were aborted by this court's decision, in the *180-Day Appeals*, that CNJ would be reorganized under the Rail Act. CNJ alleges that, but for that decision, it would have reached accord with New Jersey for a sale of all of CNJ's rail assets for a price in the range of $100 million. Accordingly, CNJ argues, we should assign CNJ a net liquidation value of $100 million, based on an actual, probable sales opportunity foreclosed by the intervention of the Act.

The GPs mount two attacks on this contention, one factual and one legal. Factually, they argue that New Jersey never made any offer or decision to buy CNJ, for $100 million or for any other price. The negotiations CNJ describes, the GPs say, were merely exploratory on the State's part—an attempt to discover the possible size and shape of one among several options open to it. Legally, the GPs contend that even if CNJ's version of the facts is correct, the court should not take cognizance of them because the events in question all occurred in the presence of the Rail Act. The passage of the Act and the resulting infusion of federal activity and money into the Northeast rail system, they argue, must have had a substantial influence on New Jersey's alleged decision to focus its efforts on CNJ. We need not reach the legal issue, however, because we are persuaded by the GPs' factual argument.

CNJ went into bankruptcy in 1967. Its trustee in bankruptcy, R. D. Timpany, who took office in January 1971, was in sporadic communication with New Jersey State officials throughout his

tenure concerning such matters as the State's subsidy of CNJ passenger operations, a possible lease of passenger facilities to the State, and a proposed extension of the Port Authority's operations near Newark. Serious negotiations for a possible State purchase of CNJ did not begin until the election of Brendan Byrne as Governor in November 1973.

The principal negotiator for the State was Alan Sagner, Governor Byrne's Commissioner of Transportation. Sagner spoke or corresponded with Timpany and, separately, with representatives of a committee of bondholders on several occasions in February, March and April 1974. The parties agree, however, that these talks were merely exploratory as to any State purchase. On March 28, Sagner told Jacob Goodstein, a bondholders' representative, that he saw no possibility of a purchase in the immediate future. By April 3, when CNJ's reorganization court held a hearing to determine whether CNJ would be reorganized under the Rail Act or under section 77 of the Bankruptcy Act, the State had decided that it preferred a Rail Act solution. Nevertheless, Sagner continued into early summer to discuss the possibility of a purchase. He met with the bondholders and with the bankruptcy judge, and he requested advice from the Port Authority on how an acquisition might be structured.

In late June 1974, a series of related events set off a small crisis and led to the resumption of active negotiations. CNJ's contract with the State for subsidies on its passenger operations was scheduled to expire on June 30. On June 27, CNJ petitioned USRA for permission to cease all rail operations. The following day the reorganization court issued its decision that CNJ would not be reorganized under the Rail Act. Faced with the possibility of a shutdown of CNJ, Sagner met with Timpany and federal officials to arrange a short-time solution to maintain the status quo while New Jersey and other parties appealed the district court's ruling to this court. The resulting agreement, approved by the district court on July 15, provided for modification of the State's passenger subsidies and for extensive State expenditures to rehabilitate

CNJ's main line. The United States Department of Transportation agreed to provide an additional $3 million advance under § 213 of the Act. In return, CNJ agreed to a stay of the district court's decision, and it agreed to continue passenger and freight operations through November 30, 1979. The parties also agreed to enter into good faith negotiations looking toward a permanent viable solution for CNJ.

Apparently taking this last point to heart, Sagner attended two meetings on July 18. The first, in Washington, was with several federal transportation officials. Sagner mentioned the possibility of a State purchase of CNJ, but pointed out that the transaction would require substantial federal financial help. The federal officials were noncommittal.

The second meeting of the day, in New York, is a key element of CNJ's factual case. Sagner met with several representatives of the bankholders' group to discuss a possible purchase. It was at this meeting that, according to CNJ, Sagner, as New Jersey's Commissioner of Transportation, made an offer to buy the railroad. Timothy Crane, a member of the bondholders' committee, stated, both in a contemporary file memorandum and in later testimony, that Sagner presented a tentative offer to buy all of CNJ's properties, except for three parcels of off-line realty and certain court-controlled accounts. The State would assume an estimated $94 million in obligations and would pay $25 million in cash. The bondholder representatives Crane said, reacted favorably to Sagner's proposal. Crane (S) (Dec. 31, 1978) Ex. 1, CNJ Reply App. at 11. Sagner, by contrast, stated in his file memorandum that the proposal Crane described was in fact presented by Jacob Goodstein, and that Sagner made no commitment on any price. He testified that "what I intended to convey to all of the people involved is that there were no proposals, there were no offers". Sagner (D) (Mar. 21, 1979) at 74, I CNJ App. at 180. Goodstein testified simply that "we discussed a proposed deal" matching the description given by Crane. Goodstein (S) (Dec. 31, 1978) at 7, I CNJ App. at 95.

There are numerous reasons, even in CNJ's own evidence, why we must credit Sagner's recollection of the July 18 meeting over Crane's. On the next day, according to an aide's contemporary memorandum, Sagner told his staff that he was interested in the "possibility" of a State purchase of CNJ, but also considered the possibility that a Conrail solution would be better. Ex CNJ-3, I CNJ App. at 147-49. On July 26, Sagner's office requested two independent valuations of CNJ—one by Sagner's own department, and the other by L. E. Peabody & Associates, a consulting firm. The instructions for the latter study show that Sagner was apparently still undecided as to the form of the transaction (purchase of assets vs. tender offer for bonds),[336] as to whether the State might itself operate the railroad after acquisition, and as to the proper basis for determining the purchase price. At a meeting with Goodstein on July 30 (according to Goodstein's account), Sagner again raised the question of the form of the transaction; he also revealed that he had not yet decided whether off-line realty should be included in a purchase, although he leaned toward exclusion. He raised possible political difficulties if the bondholders were paid in full. Finally, he mentioned that he had commissioned the Peabody valuation study and stated that any proposals he might make would be based on that study. Goodstein (S) (Dec. 31, 1978) at 9, I CNJ App. at 97. As late as August 23, Sagner expressed his expectation that CNJ's net liquidation value,[337] in his opinion, the only proper basis for a price, would be in the range of $70 to $80 million. In the face of this evidence, it is incredible that on July 18 Sagner committed himself, even "tentatively", to a detailed (and unwritten) offer of purchase at a price of $119 million. On the contrary, CNJ's own evidence bears out the inference that, if Sagner raised the "proposed deal" at all, he did so hypothetically in order that he might estimate the bondholders' position.

Of course, it is not necessarily fatal to CNJ's case that no offer was made on July 18, for the record shows that Sagner continued through September to pursue the possibility of purchase. We

have already mentioned his meetings with his own staff on July 19, with the Peabody consultants on July 26, and with Goodstein on July 30. On July 24, he met with Timpany and requested that Timpany propose an offer to sell that Timpany would be willing to submit to the reorganization court. Timpany complied on July 26; his offer proposed a sale, effective on September 1, 1974, of all CNJ properties except court-controlled accounts and three parcels of off-line realty. The State would pay the first $80 million in claims against the estate, plus $25 million in cash less a credit for any reduction the State might procure in claims held by the federal government against CNJ. Timpany (S) (Dec. 31, 1978) Ex. 18. A month later, at an August 23 meeting with federal officials, Sagner reportedly remarked that New Jersey then "contemplated" buying the CNJ and was preparing a bond issue for that purpose. On the other hand, it was at this meeting that Sagner said he expected to pay only $70 to $80 million, and that he learned that he could not obtain any waiver of federal claims against CNJ. Jacoby (S) (Dec. 31, 1978) Ex. 60 at 2. On September 12, Sagner again met with Timpany to review the problem. Sagner expressed concern about paying more than book value for CNJ's assets, but Timpany told him that no data on book value existed. Sagner also asked Timpany's advice on how the State ought to run the railroad if it acquired it. On September 25, Sagner met with USRA officials; they said that a State acquisition was probably better than a market solution, and that partial federal funding might be available under the Rail Act. They pointed out, however, that a federal acquisition was still among USRA's options. Three days later negotiations effectively stopped when this court decided that CNJ should be reorganized under the Act, *180-Day Appeals,* 384 F.Supp. at 954-55, 987-89.

This train of events substantiates CNJ's assertion that, up until that decision, New Jersey had shown great and increasing interest in purchasing CNJ.[338] Despite this, it is far from certain that the State would have actually carried out such a project. On the

contrary, neither Sagner nor any one else in State government was ready to make any final decision on the matter. Although Sagner apparently had Governor Byrne's authority to "explore" the possibility of a purchase, there is no suggestion that he was ever authorized to close a deal, or even to make a tentative proposal. Nor is there any evidence that Sagner or his staff had drawn up any particular plans for acquisition or operation of the railroad. On July 26, Sagner asked the Peabody firm for advice on such basic questions as whether the State should buy freight-only properties in addition to passenger lines, whether it should buy CNJ's nonrail properties, whether New Jersey should operate rail service itself or contract to have private railroads do it, and whether it should make a tender offer for CNJ's publicly held bonds. With the possible exception of the last item, there is no record that Sagner ever reached any decision on these points. Nor did he ever request, let alone receive, any sort of study or estimate of the financial burden the State would incur in operating CNJ—surely a major factor in any decision to buy. It is hardly surprising, then, that Sagner never presented any definite proposal to buy CNJ to the Governor, members of the legislature, the State Attorney General or Treasurer, the Port Authority, the United States Department of Transportation, USRA, or any of the other public agencies that one would expect to participate in such a decision. Moreover there was no consensus, either within Sagner's department or between Sagner and the various CNJ parties, as to an appropriate price.

The existence of substantial uncertainty as to the sale price and properties to be included in the transaction casts further doubt on CNJ's claim that an agreement had nearly been reached. CNJ asserts that the price would have been "in the $100 million range", CNJ at 3, but it appears that that range extended quite far on either side of the mark. We have found ten or more figures in the record, ranging from a low of $70 million to a high of nearly $120 million, representing the proposals, suggestions, predictions, and after-the-fact estimates of the many persons involved as to

what the sale price would be.[339] CNJ's suggested figure of $100 million, then, could be 15 percent too low, or it might be 43 percent too high; there is precious little in the record to tell us where within this $48 million range of possibilities the final result would have fallen. Even that does not reflect the full degree of uncertainty we face. In the first place, there is the problem as to how much of CNJ's property the State would have bought. Perhaps more important is that not all of the many prices mentioned (for example, neither of the proposals by Goodstein or Timpany) can readily be adjusted to exclude the value of CNJ's assets not conveyed to USRA.

In short, although the record suggests that Sagner pursued and probably favored a State purchase, it does not bear out the allegation that New Jersey was on the verge of buying CNJ's entire system. On the contrary, we cannot conclude with any confidence that any State purchase would have occurred at all. There are simply too many unknowns, too many decisions not yet made, too many important actors still absent from the stage, to permit that.

B. *Central Railroad of New Jersey's Alternative Scenario*

CNJ's alternative scenario differs little from the supposed "real life" deal we have just discussed: once again, CNJ alleges a sale of all of its rail properties to New Jersey for $100 million. The most important factual difference between the two sets of contentions concerns timing. According to CNJ, its "real life" sale would have taken place sometime late in 1974. In the absence of the Rail Act, however, CNJ contends that the sale would have occurred a year earlier, in the fall of 1973.

Appendix H

1. *Purchase for Rail Use*

We accept CNJ's contention that, in the absence of the Rail Act, New Jersey would have brought all of CNJ's conveyed properties. CNJ's evidence shows that its commuter lines including the New York & Long Branch Railroad, which CNJ owned jointly with PC, carried 25,000 passengers a day into the New York metropolitan area. New Jersey had already recognized the public importance of this service, providing many millions of dollars in subsidy payments and indirect financial assistance. In 1972 the State had negotiated seriously for a possible lease of CNJ's passenger facilities. CNJ at 28. The State similarly recognized the importance of CNJ's freight service. For example, in 1971, the Commuter Operating Agency found that service "essential", remarking that its loss would be a "serious hardship" to shippers and their employees and communities. Timpany (S) (Dec. 31, 1978) Ex. 6 at 5-6. These State findings were confirmed by a 1971 decision of the United States Secretary of Transportation, Timpany (S) (Dec. 31, 1978) Ex. 3. CNJ served an important function as a sort of state-wide freight terminal carrier. In 1973 it carried 200,000 carloads (mostly originating or terminating traffic), serving some 1,400 customers both on- and off-line. Much of this traffic relied exclusively on CNJ. In the absence of any prospect of private acquisition,[340] then, we find it likely that New Jersey would have intervened to save CNJ's passenger and freight service by purchasing CNJ's rail properties for continued rail use.

The GPs make no attempt to show that any particular CNJ line or facility would not have been acquired. See Part III, p. 25, *supra*. Their main attacks on CNJ's alternative scenario are two that we have already addressed and rejected—the contentions that New Jersey lacked the legal authority and financial capacity to make large rail purchases. The GPs also point out material discrepancies between CNJ's proffer and those of other Ts, especially the JTTs.[341] To point out inconsistencies, however, is not to

resolve them in GPs' favor. In the absence of any evidence that any particular line would not have been acquired, we hold that GPs have not rebutted CNJ's showing that its entire system would have been purchased for rail use.

2. *Timing*

The boldest feature of CNJ's alternative scenario is its assertion that the transaction would have been completed in the fall of 1973. We have already noted the key difficulty in claims of early, independent dispositions: the likelihood that any sale must await the outcome of a comprehensive regional rail planning process. As we said in the *CUE Opinion*, "we think it unlikely that the ICC would have tied its hands early in the proceeding by permitting abandonment or sale of major lines even before it knew what shape the surviving system might take". 439 F.Supp. at 1375. CNJ seeks to escape this mire by arguing that it would have entered the abandonment process so early, and completed its transaction so quickly, that all would have been over before anyone could have seen the need to coordinate CNJ's disposition with those of other bankrupt carriers. We find this contention implausible.

CNJ alleges that it would have been the first T to seek abandonment.[342] CNJ had been in reorganization since 1967, longer than any other T. It had not reported an annual profit since 1957; by 1973, it showed a negative net worth. It was in arrears on interline balances and on scheduled wage increases for its employees. It had already begun disposing of some of its facilities and operations; in 1971-72, it halted its New York harbor lightering operations, its Jersey City coal dumping activities, its entire Pennsylvania freight operation, and its service on several small branch lines. In late 1972 Trustee Timpany staved off the latest of several attempts by the bondholders to force a shutdown of all rail operations. At the same time, however, Timpany

himself petitioned the reorganization court for permission to cancel CNJ's subsidy agreement with the State and to terminate all passenger service if the State would not agree to a more generous subsidy. The district court granted that relief in December 1972, but the Court of Appeals for the Third Circuit, sitting *en banc*, reversed, *In re Central Railroad of New Jersey*, 485 F.2d 208 (3 Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974). In the absence of the Rail Act, according to Timpany, he would have responded to this reversal by filing immediately in the district court for permission to abandon all operations. CNJ contends that this petition would have been virtually unopposed, and would nave been granted with very little delay. Accordingly, New Jersey would have stepped in with an immediate purchase to avoid cessation of service.

We find several serious flaws in this thesis. The first in CNJ's assertion that it would have been the first of the bankrupts to seek liquidation. Indeed, for CNJ to prevail, it must show not only that it would have been the first, but also that it would have led by a margin of at least several months—long enough to allow it substantially to complete its disposition before other parties realized the need for an overall regional solution. CNJ has foreseen our conclusion that PC and other Ts would have filed for abandonment by February 1973, but it contends that this is more a matter of concession by the GPs than of factual proof. CNJ argues that it is entitled, if it can, to show as a matter of fact that the other bankrupts would not have sought to close down in 1973. We need not pass on CNJ's characterization of our conclusions, however, because there is a glaring gap in CNJ's own attempted proof. Although CNJ presents detailed argument as to whether LV, EL, and R would have sought liquidation before CNJ did, it makes no effort at all to show that PC would not have done so.[343] PC was the key to the Northeastern rail problem; it was by far the most important carrier, both in the region as a whole and in New Jersey in particular. In the absence of any evidence, or even any

square allegation, that PC would not have applied for abandonment, we cannot credit CNJ's contention that it would have received authority for abandonment before any other major liquidations commenced.

Even if CNJ would have been the first to seek liquidation, we find no warrant for its contentions concerning the rapidity with which it could have completed the abandonment hearing and the consequent sale to New Jersey. The key to the argument is CNJ's allegation that it could have obtained speedy abandonment authority from the reorganization court without having to go to the ICC or any New Jersey regulatory agency. This seems unlikely in view of the Third Circuit's *en banc* opinion dealing with CNJ's petition to abandon its passenger operations. *In re Central Railroad of New Jersey, supra.* The court applied the requirement of section 77(a) of the then-current Bankruptcy Act, 11 U.S.C. § 205(a)(1970), that a reorganization court may approve a trustee's petition for permission to abandon all or part of a line "only with the approval and authorization of the Commission when required by [the Interstate Commerce Act]". The court held that CNJ, if subject to the ICC's jurisdiction, could not abandon service without ICC approval. 485 F.2d at 211-12. Even absent ICC jurisdiction, the court held, CNJ must seek approval from the Commuter Operating Authority, a State agency. *Id.* at 212-13, citing *Palmer v. Massachusetts*, 308 U.S. 79 (1939). The court rejected CNJ's argument that it was constitutionally entitled to abandon without seeking regulatory approval because of financial erosion. Since CNJ had not even applied to any agency, the court reasoned, it was not allowed to attempt to show that its application would meet undue delay or frustration. The court distinguished *Brooks-Scanlon Co. v. Railroad Commission*, 251 U.S. 396 (1920), and *Railroad Commission v. Eastern Texas R.R.*, 264 U.S. 79 (1924). In *Eastern Texas*, the issue was the carrier's substantive right to abandon, not the procedures it must follow. In *Brooks-Scanlon*, the procedural issue arose as a collateral point, but the Supreme Court

disposed of it by noting that the regulatory agency had already indicated its refusal to grant the requested relief. 251 U.S. at 400. Instead, the *CNJ* court relied on *Palmer v. Massachusetts* to hold that the bankruptcy court could not bypass the administrative agencies. 485 F.2d at 213-15. In the face of this holding, which we approved in the *CUE Opinion*, 439 F.Supp. at 1369, 1372 n.34, it is hard to indulge the assumption that CNJ's reorganization court would have repeated its error by allowing a total abandonment without referring the petition to the ICC and the Commuter Operating Authority.

CNJ tries to evade the Third Circuit's holding by suggesting that its petition to abandon all service have been unopposed in the district court. This is a non sequitur; we cannot assume that the consent of the parties would have led the district judge to disregard his statutory duty. Even granting that point, however, we find CNJ's allegation to be unsupported.

CNJ relies on evidence that purportedly shows that an attorney representing the ICC and the Justice Department conceded the district court's jurisdiction to decide the bondholders' motion in December 1972 to shut down all of CNJ's operations. Timpany (S) (Dec. 31, 1978) at 83-84. From the excerpt CNJ presented, however, it is hard to tell just what the attorney was conceding; he may have meant only that the district court should hear the bondholders' constitutional claims. Moreover, whatever he conceded, he conceded reluctantly; almost in the same breath, he asked the court to delay any shutdown to allow the ICC and other agencies to make alternative service arrangements. It is unlikely that the ICC would continue to concede the court's jurisdiction totally after the Third Circuit's ringing affirmation of the ICC's authority—especially since the need for a comprehensive regional solution could only have become clearer in the intervening months. CNJ also points to the ICC's statement in October 1973 that it was not the proper forum to decide issues of unconstitutional takings. CNJ at 119 n.*. Again, however, that is not a concession of all jurisdiction; rather, it states the obvious point

that the reorganization court retains authority to act in cases of undue delay, frustration, cashlessness, or similar emergencies.

Even had the ICC been as accommodating as CNJ would like, it is improbable that New Jersey would have been the same. The State did fight the district court's decision to bypass the ICC and the Commuter Operating Authority in December 1972; indeed, it was a successful appellant in the Third Circuit's *en banc* reversal of that decision. There are several reasons to suppose that New Jersey would have continued to press the public interest in continued rail service, both before the ICC and in the district court.[344] By September 1973 the State, like the ICC, would have perceived the need for comprehensive planning; even if the ICC had not acted, New Jersey would have sought time to develop its own overall solution within the State. The need for caution would have been multiplied by the lame-duck incumbency of Governor Cahill between his primary defeat in June 1973 and Governor Byrne's inauguration in January 1974. Several witnesses, including Timpany, testified that Cahill's policy was to leave all major policy decisions to the successor administration. 4 GP at P 141-42. Furthermore, even if New Jersey had decided in September 1973 to buy CNJ, it does not follow that it would have agreed to a court order relieving CNJ of its duty to operate. The State surely would not have irrevocably committed itself to a purchase until it had reached agreement on a purchase price—a time-consuming matter. There is no reason why it would have volunteered to accept all interim operating losses during negotiations, if it could have imposed those losses on CNJ's stockholders and creditors by delaying or defeating CNJ's abandonment petition.

The conclusion we reach is that CNJ could not have escaped entanglement in a complex regional planning process.

3. *Price*

All parties agree that any sale of CNJ to New Jersey would have taken place at a price equal to what we have called X. Predictably, however, they disagree as to what X is. Of more immediate importance, they disagree as to what issues we should decide concerning it in this phase of the case. CNJ urges us to decide that the proper measure is "stand-alone" net salvage value, which disregards any possible effect of glut resulting from liquidation of several northeastern railroads at about the same time. That is not all, however; CNJ further urges us to fix an actual dollar amount for its sales price, based on several studies of CNJ done between 1969 and 1974.[345] For reasons developed in Part III of this opinion, we agree with the GPs that these questions must be left for decision in the nonrail use phase of the case.

Petitions for reconsideration may be served and filed on or before 21 days from the filing of this opinion.[346] While it is not setting any page limit, the court requests that such petitions be limited to instances where the court is thought to have misapprehended evidence or to have erred in computations and not repeat arguments that have been made at length in the opening briefs

and reply briefs and in oral argument and have been fully considered. Answers to such petitions shall not be filed unless requested by the court.

HENRY J. FRIENDLY

.....

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

.....

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

.....

Roszel C. Thomsen
Judge

Dated: November 24, 1981

Appendix H

GLOSSARY

AA	Ann Arbor
AAR	Association of American Railroads
AREA	American Railway Engineering Association
AWCC	Average weighted cost of capital
B&M	Boston & Maine Railroad
BTF	Bridge track feet
CERL	Combined Erie, Reading and Lehigh Valley
CMV	Constitutional minimum value
CNJ	Central Railroad of New Jersey
CRA	Charles River Associates
CUE	Compensable unconstitutional erosion
DCF	Discounted cash flow
D,T&I	Detroit, Toledo & Ironton
EBIT	Earnings before interest and taxes
EL	Erie Lackawanna
ELMPA	Erie Lackawanna Merger Protection Agreement
FAHA	Federal Aid Highway Act
FAUS	Federal Aid—Urban System Program
FRA	Federal Railroad Administration
FSP	Final System Plan
GPs	Government Parties
ICC	Interstate Commerce Commission
IFLs	Intercity freight lines
JT	Joint Terminal
JTTs	Joint Terminals Transferors
LIRR	Long Island Railroad
L&NE	Lehigh & New England
LPCs	Labor Protection Costs
LV	Lehigh Valley

MBTA	Massachusetts Bay Transportation Authority
MGT	Millions of gross tons per year
MOWE	Maintenance of way expenses
MTA	Metropolitan Transportation Authority
NEPA	National Environmental Policy Act
NJ/NYTerm	New Jersey/New York Terminal
PC	Penn Central
PCMPA	Penn Central Merger Protection Agreement
PDV	Present discounted value
Philaterm	Philadelphia Terminal
R	Reading
RC	Rehabilitation costs
SEPTA	Southeastern Pennsylvania Transportation Authority
S&P	Sverdrup & Parcel and Associates
TOFC	Trailer on Flat Car
T	Transferor
UMTA	Urban Mass Transportation Act
USRA	United States Railway Association
WJPA	Washington Job Protection Agreement
X	See p. 31 & n.23, *supra*.

Appendix H

FOOTNOTES

1. The phrase was not meant to imply that the GPs had the burden of proof on such issues but rather to refer to issues on which the GPs has been working and could continue to work effectively without having the Ts' direct cases in hand. The parties clearly understood this.

2. This, and other procedural innovations later described, resulted from informal exchanges between the court and its executive attorney, Richard E. Eriksen, Esq., who has rendered invaluable service throughout these proceedings, with the Steering Committees for the Government Parties and the Transferors and Intervenors. After substantial agreement had been reached, the court would issue a show cause order why certain procedures should not be adopted. On the principal procedural innovations, to wit, the submission of direct evidence in writing and the conduct of cross-examination by deposition, there was no objection and an appropriate order was entered.

3. There were remarkably few of these. Most of those requiring judicial action were disposed of by Judge Thomsen, as a single judge, under Rule 4-A of this court.

4. PC's affiliated Ts include 38 wholly owned subsidiaries and 7 with shareholders outside the PC group.

5. The settlement for Pennsylvania-Reading Seashore Lines was approved on January 26, 1981, Sp. Ct. Rep. N 31838; for Dayton Union on February 12, 1981, *id.* N 32113; and for Lehigh & Hudson River and New York & Long Branch on February 26, 1981, *id.* N 32208, N 32214.

6. The settlement for Philadelphia, Germantown & Norristown was approved on October 23, 1981, Sp. Ct. Rep. N 37877, for Delaware & Bound Brook on October 19, 1981, *id.*, at N 37855. The settlement for North Penn had not been approved at the time of publication of this opinion.

7. The proffered Joint Terminals would have included certain properties of the CNJ as well. However, CNJ has studiously avoided any participation in the JT proffer.

8. The route from Chicago through Cleveland and Buffalo to New York was basically the former New York Central "water level" route. The routes from Chicago to Pittsburgh and from St. Louis to Pittsburgh

and Harrisburg were basically the former Pennsylvania Railroad's main lines.

9. Although PC joined in the JT proffer, it was not part of PC's primary case indicating what would have become of its lines in the absence of the Rail Act. The value of some of the IFLs did, however, depend upon the continued viability of freight lines in the terminal areas. See Memorandum on Behalf of PC Concerning JTs Evidentiary Submission (Dec. 15, 1978).

10. For a discussion of EL's use of the term "net salvage value", see note 16, *infra*. While we do not now decide the point, we confess to great difficulty in envisioning a sale to another railroad at "net salvage value" higher than earnings value if earnings value includes all the elements noted in Part V, pp. 40-41, *infra*, of this opinion. We do not believe that EL would disagree.

11. These earnings value figures are derived from a study of LV's value to Conrail rather than its value to hypothesized acquirers.

12. LV contends that, on this hypothesis, its line north from Sayre, Pennsylvania, through Ithaca, New York, to Ludlowville, New York, would have been acquired by shippers with assistance from the State of New York and a public regional corporation.

13. With the exception of 18 miles of LV track in the Geneva-Auburn, New York, area, which connected to PC's "Water Level Route", from Chicago to New York, LV contends that none of its routes are dependent upon the continued existence of any IFLs. LV has also treated these 18 miles of track as "specialized properties".

14. Just prior to scheduling rebuttal evidence, EL, R, and LV moved to exclude from consideration evidence submitted by the GPs indicating what value the "Combined Erie, Reading, and Lehigh Valley" (CERL) would have had to the Chessie on April 1, 1976, Sp. Ct. Rep. N 19316. The Ts included in CERL contended that this evidence was irrelevant to the acquisitions they had proffered, that the GPs had no need to go beyond their directly responsive evidence for the purpose of establishing their claim that the Ts' properties had negative earnings value, and that consideration of the CERL evidence would require much further discovery and cross-examination by them. The court determined that the CERL evidence would not aid it in determining rail use values of the properties of the CERL transferors, and thus ordered that the evidence would not be considered, in the interest of avoiding unnecessary delay.

Order Limiting Rail Use Issues Between the Government Parties and the Erie Lackawanna, Reading and Lehigh Valley Trustees (March 26, 1980), Sp. Ct. Rep. N 19685. The breadth of this order was defined in the parties' Stipulation Regarding Scope of the Order Limiting Rail Use Issues (March 26, 1980), filed on October 24, 1980, Sp. Ct. Rep. N 22028, which specified the portions of testimony to be excluded. See 4 GP at G 1-11.

15. This is subject to the important caveat with respect to the possibility of our having to depart from the "market value" rule under the unique facts of this case expressed in the *CMV Opinion*, 445 F.Supp. at 1030-31, 1045.

16. At least some of the Ts, notably EL, use "net salvage value" in the sense in which that term has been used in ICC abandonment proceedings. However, that does not get us far. EL tells us: Prior to the Rail Act era, no specific ICC rules existed concerning the determination of net salvage value. ELRB at 335. EL also tells us, *id.*, without contradiction, "in practical application it generally came to mean the gross proceeds realizable upon dismantlement of rail lines and the sale of the removed materials (together with real estate, rolling stock, etc.) less the cost of such dismantlement" but without the deduction of other costs (e.g., expenses of a selling organization if needed, and reduction to present value), which the Supreme Court recognized to be appropriate in determining a fair and equitable price for a purchased railroad without earning power in the *New Haven Inclusion Cases*, 339 U.S. 392, 436 (1970), or of "glut", *i.e.*, the temporary presence of an extraordinarily large supply, accompanied by a lessening of demand, due to the assumed nearly simultaneous dismemberment of large portions of the Ts' lines. A petitioner for abandonment is required to include its estimate of net salvage value in its abandonment application. 49 CFR 1121.44(c).

It thus seems that the ICC does not in fact "determine" net salvage value and also that the only significance of its specification by the petitioner is that the ICC customarily conditions approval of abandonments on an agreement of the petitioner to sell for continued rail use at a figure at or above net salvage value. The sole explanation for the omission of commonly recognized deductions in the determination of scrap value which we have found in the record is in the testimony of Shannon on behalf of EL:

> These conventions probably relate to the recognition that a buyer has perceived a rail use value in the line proposed for abandonment. If all possible theoretical deductions were made, the buyer would have paid nothing for the rail use value, since it could itself still liquidate the properties (assuming authority to do so) and receive the same price that it paid.

Shannon (S) (Dec. 31, 1978) at 76.

We confess our inability to understand this explanation. Nothing prevents a purchaser for continued rail use from bargaining for a figure lower than net salvage value, and the petitioner for abandonment would still prefer to accept the offer if it were even nominally more than what the petitioner would receive as scrap value after all proper deductions. Perhaps the answer is that since in small transactions the difference between net salvage value and a more nearly accurate scrap value figure is not likely to be significant, use of net salvage value saves the parties from the expense of protracted investigation and negotiation, and the petitioner's announcement of net salvage value assures a purchaser for continued rail use that a bid in that amount will be accepted unless other acquirers for rail use bid more.

17. This statement should be read with the qualification that we have not made a detailed examination of the massive evidence introduced by PC.

18. The best illustrations are found in EL's case. EL concedes that if its acquirer were to be the Chessie rather than a Western line, EL's main line west of Sterling, Ohio, to Chicago would have been abandoned as duplicative of Chessie's own line and that if its acquirer were to be Norfolk & Western, EL's main line west of Huntington, Indiana, to Chicago would have been abandoned as duplicative of Norfolk & Western's own line. Again, as indicated in Part II, EL and LV urge that LV's line from Waverly, New York, to Oak Island Yard near Newark, New Jersey, was a superior routing to EL's line through Scranton, Pennsylvania, to Croxton Yard near Weehawken, New Jersey; EL concedes that if an acquirer chose the EL-LV combination, the Lackawanna line from Binghamton via Scranton would have been abandoned except that certain eastern portions would have been sold to a public body, presumably the State of New Jersey, primarily for passenger service.

19. We say this despite the statement in our Order upon Motion of the Government Parties for Temporary Suspension of Trial Proceedings

with respect to the Claims of all Transferor Parties other than the Penn Central Corporation (December 5, 1980) at 5, Sp. Ct. Rep. at N 23424, wherein we reminded the Ts "that to the extent that any of their proposals for continued operation hinge on continued operation of lines of PC, they have the burden of showing that such lines would in fact have been continued in rail use through sales to private entities or to public bodies other than the United States rather than being scrapped, although not of showing that PC would have received the price for which it contended". When an adversary declines a specific contest, as the GPs have on the issue here under discussion, the burden on a proponent is relatively slight. See also the discussion with respect to consideration of the acquirer of an IFL as the purchaser of another's railroad, pp. 284-86, *infra*.

20. This position was reiterated by counsel for the GPs at oral argument. Tr. at 412.

21. This avoids the seeming anomaly of pricing non-scrapped property on the basis that it would have been scrapped. The GPs say there is no anomaly since an owner whose property was without significant earnings value is entitled only to its next best use, to wit, sale for scrap, regardless of what in fact happens to the property, and that a purchaser would pay no more. The New Haven was valued primarily on that basis but without objection, *New Haven Inclusion Cases, supra,* 399 U.S. at 436.

22. A prime example is the contention that public bodies would have paid more than net salvage value for losing passenger lines.

23. We choose the letter X rather than "net salvage value" because of the danger that the latter term could mean either salvage value or scrap value, assuming there is a difference between them. In fact, we may find different X's depending on whether a particular property, although without significant earnings value, would or would not be continued in rail use.

24. While we ruled in the *CMV Opinion,* 445 F.Supp. at 1013-16, that in valuing the Ts' properties the United States could not be considered as a prospective taker, we made clear that this did not mean that we must assume that the Government would have simply sat by with its hands folded while the nation moved toward the precipice of economic

collapse, see *id.* at 1008-09 (consideration of interim aid to avoid shutdowns because of cashlessness and regulatory changes permissible in alternative scenario).

25. Shannon, a witness for EL, AA, and PC, is President and Chairman of Wyer, Dick & Co., a transportation consulting firm which for 40 years has specialized in railroad valuation and economics. He has been in the railroad industry since 1936 and has an extensive background in all phases of operations and management. After leaving the New Haven Railroad as Executive Vice President in 1960, he joined Wyer Dick where he has primarily counselled that firm's clients on mergers, acquisitions, and valuation of rail properties. Over the past eighteen years he has been involved in several detailed studies of EL. Shannon (S) (Dec. 31, 1978) at 1-8.

26. The GPs assert that we should discount the value of the Ts' proffered sales for the risk that they might not have materialized. 2 GPRB at Y 20-29. Taking this argument literally would require that we determine values not only for the most likely outcome, but for all possible (nonspeculative) outcomes, weighting each by the probability of its occurrence in the alternative scenario—hardly a feasible approach given the multitude of possible permutations. We think this point can be deferred until we attempt to arrive at definitive figures.

27. We shall use this phrase to include all the properties here at issue although many would generally be regarded as lying in the Midwest. ICC statistics for the Northeast region include New England, the states of Delaware, Virginia, Maryland, Pennsylvania, New York, and New Jersey, and the District of Columbia.

28. Kornhauser is Director of the Transportation Program for Princeton University and is an Associate Professor of Civil Engineering at the University. He has published extensively in the field of transportation planning and economics.

29. The most obvious example is savings in overhead through the elimination or curtailment of the acquired line's executives, and legal, accounting, and traffic departments. Obviously elimination of such departments of the seller would somewhat increase the costs of the corresponding departments of the acquirer; only the net decrease constitutes a saving. The GPs insist that buyers would demand a "share" of savings in overhead and would appropriate the entire savings on their

own lines. We think rather that a capitalization of all such savings, if substantiated, would enter into the buyer's reservation price.

Another type of saving would occur when substitution of a superior line of the seller would enable the buyer to downgrade or even abandon lines of its own. An example of this is EL's claim that an acquisition by Chessie would have permitted the latter to rationalize its Chicago to Buffalo service by abandoning its expensive cross-Canada route and to rationalize its Wisconsin to Buffalo route by abandoning its car-ferry operations to Michigan.

30. The parties refer to the latter as "opportunity costs". The most dramatic case would consist of earnings on traffic interchanged by the buyer with the seller which originated or terminated at points on the seller's line not served by any other railroad. Professor Kornhauser distinguished such "lost traffic" from "jeopardized traffic", to wit, traffic that had been handled with the selling railroad and originated or terminated at points served by roads that were continuing in business. He thought this was also significant although incapable of accurate quantification. The jeopardy would arise from the circuity of the new route, inability because of physical limitations (e.g., single tracking) of the alternative carrier to handle the new traffic efficiently, or policies of the alternative carrier to favor other connections.

31. On this point EL argues that the remaining solvent east-west carriers, primarily Chessie and Norfolk & Western, not only would not have afforded service to many points in the east but that many of their lines were unduly circuitous or could not have absorbed the added volume of traffic previously carried by the bankrupts.

32. We shall follow the parties in calling these off-segment earnings. For example, if Santa Fe acquired EL it could divert to its own lines west of Chicago a certain amount of traffic originating or terminating at points on EL which EL had previously exchanged with other Western carriers at the Chicago gateway. As against this, other Western carriers acquiring other eastern lines such as PC's water-level route from Chicago to New York or its route from Chicago to Pittsburgh and thence to Harrisburg, and on to Philadelphia and New York, could have diverted to themselves certain traffic that these Eastern lines had previously exchanged at Chicago with Santa Fe. EL regarded the balancing of these pluses and minuses as so speculative that it did not take this sort of diverted traffic into account in its revenue estimates for a Western line

acquisition. On the other hand, in its estimates for a Chessie acquisition it did consider the value of revenues on EL's Sterling-Chicago line, which would be abandoned, with the traffic passing to the B&O. We discuss off-segment earnings most extensively in connection with AA, see pp. 286-88, *infra*.

33. The chief example of this was Shannon's claim that creation of one or more transcontinental railroads would have created entirely new rail traffic. Shannon (S) (PC) (Dec. 1, 1978) at 39.

34. Shannon (S) (EL) (Dec. 31, 1978) following 29. This compares with Santa Fe's total pre-tax net income of $144,400,000. Smith (S) (Jan. 30, 1980) Ex. 27 at 8.

35. Kornhauser estimated that the opportunity cost, see note 30, *supra*, to Santa Fe would have been $19,090,000 in 1973 revenues, $7,254,000 in pre-tax profits, and $3,627,000 in after-tax profits if the PC IFLs had ceased operations. In addition, $78,874,000 in revenues would have been jeopardized, see note 30, *supra*, Kornhauser (S) (Dec. 1, 1978) at 50, 53.

36. Numerous witnesses testified to the effect that once a railroad has been shut down, there are serious obstacles to a new start even though the tracks are still in place. See note 263, *infra*.

37. This is indicated by our prophecy that it was the GPs who would doubtless protest the idea of a consortium purchase. Instead they now advocate it.

38. EL agues that § 5(11) immunity would not have been available since the transaction would have been consummated under § 1(18). Passing the point whether the transactions here at issue could have been carried out under § 1(18), which is discussed in Part IX, we doubt whether the Ts would have had sufficient bargaining power to refuse to proceed under § 5 if purchasing railroads had insisted.

39. The GPs have argued that Chessie lacked the resources to finance all the transactions in which it has been named as a potential purchaser. But no one suggested that Chessie would have made all these purchases.

40. In addition to GP witness Jacobs, Shannon, testifying as a PC witness, discussed the possibility of purchases by a consortium but in terms of a consortium bidding against individual lines and having to pay more. Shannon (S) (PC) (Dec. 1, 1978) at 41. Kornhauser also

looked with favor on the idea of a consortium purchase as a means of avoiding uncertainties with respect to existing traffic flows but did not consider the effect of this on price. Kornhauser (S) (Dec. 1, 1978) at 55-58.

41. Murphy is Executive Vice President of the Consulting Center, Inc. Prior to joining that company, he was Vice President of Finance and Operations at USRA and an official with the United States Department of Transportation.

Both Murphy and PC witness Richard Olsen, a senior associate at the consulting firm of Charles River Associates who has an extensive background in transportation economics, developed multiple year cost projections through 1985 which specifically took into account the effects of inflation upon IFL costs and revenues. Murphy concluded that these effects would be distinctly adverse; Olsen concluded that by a combination of rate increases and higher productivity the IFLs would more than meet increased costs due to inflation. We make no attempt to resolve this conflict since no witness attempted to replicate the IFL inflation analysis for the Ts still in this case.

42. In addition Murphy found a 9 month lag between the increase in costs and the implementation of responsive rate increases. This was due to

> a combination of petition lag (the time between incurrence of increased costs and industry submission of a general rate increase petition to the ICC), Commission lag (the time between submission of a rate increase petition and a Commission ruling thereon), and accounting lag (the time between granting by the ICC of a rate increase authorization and implementation of increased rates pursuant thereto by the Railroads).

2 GP at E 103-04 n.58.

43. Testimony to that effect had been given by Shannon, when testifying on behalf of PC before the ICC on the viability of a shrunken PC system. See Shannon (D) (June 21, 1979) Ex. 6.

44. Smith is a Managing Director of The First Boston Corporation, has been involved in financial matters related to the railroad industry for more than a decade, and has had considerable experience in both raising capital and evaluating mergers for his railroad clients.

45. EL also cited testimony of F.L. Lee Jones, a retired First Boston official, that he had made seven merger studies on the basis of constant dollars. 2 ELF at 412 n.352. There was no indication of the nature of Smith's or Jones' constant dollar studies. If these were for the purpose of establishing a fair exchange ratio for stock in mergers, there would be no sound objection to constant dollar studies since inflation presumably would affect both merger partners equally. A study of what a buyer would pay in cash stands differently.

46. EL contends that the same picture exists if the entire period 1966-75 is analyzed. It claims that the historical data showed actual cost increases of $7,473 million as compared with $10,614 million presented in the AAR data and used by Murphy, with cumulative rate increases of $8,229 million—again an excess of rate increases over costs. ELRB at 175.

47. *Ex parte* 256, 332 I.C.C. 280, 287-88 (1968); *Ex parte* 281, 341 I.C.C. 290, 301 (1972); *Ex parte* 305, 349 I.C.C. 862, 873 (1975); *Ex parte* 310, 349 I.C.C. 555, 562-65 (1975).

EL also points out that the rate increase granted in *Ex parte* 310 was $999 million, 349 I.C.C. at 581, rather than the $889 reported by the AAR.

48. *Ex parte 265 & Ex Parte 267*, 339 I.C.C. 125, 177 (1971); *Ex parte* 281, 341 I.C.C. 290, 302 (1972).

49. EL also relied on Murphy's concession that the impact of inflation differs from railroad to railroad. However, we have been pointed to no reason why the Ts here would be less affected than the industry in general.

50. The GPs' witness, Smith, defines DCF as the amount "of cash which would have remained after all of the lines' financial and operating requirements have been met and which, therefore, would have been available either for investment in other projects or, alternatively, for distribution to shareholders as dividends." Smith (S) (Jan. 31, 1979) at 19.

51. To calculate PDV, one multiplies the future payment by a discount factor derived from the interest rate. For example, assume one wants to derive the PDV in year 0 of a DCF of $2 a year realized over a three year period valued at a 10 percent interest rate. The discount factor for the first year is equal to one divided by one plus the interest

rate. To calculate the discount factor for subsequent years one compounds the interest rate. One then multiplies the DCF by the discount factor and sums the results. The figures for the above example would thus be the following:

Year	*Discount Factor*			*DCF($)*		*PDV($)*
1	$\frac{1}{(1+.10)}$	= .91	x	2	=	1.82
2	$\frac{1}{(1+.10)^2}$	= .825	x	2	=	1.65
3	$\frac{1}{(1+.10)^3}$	= .75	x	2	=	1.50
Total						$4.97

52. To capitalize earnings one simply divides EBIT by the interest rate. For example, an enterprise expected to earn $2 a year in perpetuity valued at a 10 percent interest rate would have a capitalized earnings value of $20—$2/.10.

53. See note 44, *supra*.

54. Assume that there are two streams of income expected to be realized over a ten year period. The first stream is a constant one of $100 a year. The second yields $0 a year the first five years and $200 a year in the second five. While both average out to $100 per year, the PDV of the first is greater than that of the second. The higher the interest rate, the greater the difference. Assuming a 15 percent interest rate, the PDV of the two streams (in year 1) would be calculated as follows:

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$$PDV = \frac{\$n}{(1+i)n} - 1 \qquad \$n = \text{Payment in year } n$$

i = Interest rate
n = The year

Year	*Stream 1*		*Stream 2*	
1st	100/1.0000 =	100.00	0	
2nd	100/1.1500 =	86.96	0	
3rd	100/1.3225 =	75.61	0	
4th	100/1.5209 =	65.75	0	
5th	100/1.7490 =	57.18	0	
6th	100/2.0114 =	49.72	200/2.0114 =	99.44
7th	100/2.3131 =	43.23	200/2.3131 =	86.46
8th	100/2.6600 =	37.59	200/2.6600 =	75.19
9th	100/3.0590 =	32.69	200/3.0590 =	65.38
10th	100/3.5179 =	28.43	200/3.1579 =	56.85
TOTAL		577.17		383.32

55. This calculation represents a mix of methodologies. To calculate terminal value one divides the normalized year's earnings by the appropriate discount rate—exactly the same as the calculation of capitalized earnings value discussed in note 52, *supra*. Next, one calculates the PDV of the terminal value in the same manner as discussed in note 51, *supra*.

56. In its own study, the LV assumed that its properties would be valued on a tax-free basis. However, in the EL-LV combination, which the court considers to be the more likely outcome, see Part XII, pp. 252-53, *infra*, federal and state taxes are taken into account.

57. Involved in the railroad business since 1929, Laurie eventually became a partner in the transportation consulting firm of Wm. Wyer & Co., the predecessor of Wyer, Dick & Co. Since 1961, Laurie has been an independent transportation consultant. Laurie also submitted evidence on behalf of EL.

58. As a factual matter, it is unlikely that D,T&I would have viewed all future earnings from an AA acquisition as being tax-free. Smith testified that tax loss carryforwards must be used within seven years from the year in which the loss was realized. Smith (D) (Aug. 26, 1980) at 2176, 31 GP Supp. App. at 257. At some point, then, unless

new losses were generated, D,T&I's existing loss carryforwards would have been either used or forfeited. And if D,T&I were to generate new loss carryforwards it obviously would not be in a strong position to acquire any properties. Indeed, AA does not envision any loss carryforwards being generated by D,T&I itself since D,T&I was a profitable railroad. Rather the loss carryforwards come from D,T&I's parent company, PC. But again, if D,T&I expected that at some time in the future PC, as part of its reorganization, would have sold D,T&I, D,T&I would not have expected to remain in a tax-free status forever.

59. See Smith (D) (Aug. 26, 1980) at 2169-71, 2176-78, 31 GP Supp. App. at 254-59. To illustrate, suppose a company is choosing between two investments both yielding $100 a year before tax in perpetuity. Assuming a 10 percent interest rate and a 50 percent marginal tax rate, the market value of both investments would be $500: (.5x $100)/.10. To a tax exempt acquirer, both investments would be worth $1000. If for some reason the price of one investment rose to $600, the company would choose the other investment even though the first investment would still be worth more than $600 to the investor.

60. For a discussion of a proper treatment of depreciation in valuing an enterprise, see Blum & Katz, Depreciation and Enterprise Valuation, 32 U. Chi. L. Rev. 236 (1965).

61. Continuing the above example from note 59, *supra*, if company C had annual earnings after depreciation of $100, depreciation charges of $30 a year, and capital expenditures needed to maintain income of only $20 a year, the capitalized value of the enterprise would be $1000 if one capitalized EBIT and $1100 if one capitalized DCF. Typically, however, both because capital replacement costs usually exceed the capital acquisition costs upon which depreciation is based due to inflation and because the PDV of allowable depreciation charges is less than acquisition costs, capitalized expenditures needed to maintain income are usually greater than depreciation charges, see Blum & Katz, Depreciation and Enterprise Valuation, *supra*.

62. L&NE argues that capital expenditures needed to maintain income are not properly chargeable against earnings since they are more in the nature of retained earnings. See L&NE at 34-35. L&NE misunderstands the GPs' point. The allowance for capital expenditures is not properly deemed retained earnings since there is no net addition to the earning power of the company. These are expenditures which are

needed to maintain the earnings power of the enterprise, not to augment it.

63. Smith also included "additions to working capital" in his calculation of capital expenditures needed to maintain income. This item can safely be ignored, however, since it never exceeds even 1 percent of cashflow for the IFLs. See Jennison (S) (Cost and Revenue Analyses for the IFLs) (Dec. 1, 1978) Scheduled C.

64. Storm is a Vice President of Wyer, Dick & Co. and has been involved in rail transportation during his entire professional career. He was employed by the New York Central and the Port of New York Authority prior to his joining Wyer Dick eleven years ago.

65. Equipment trust certificates are loans secured by a first mortgage against the rolling stock purchased with the proceeds from the loan.

66. From 1931 until his retirement as General Investment Manager in 1972, Young specialized in the analysis of prospective and oversight of previously made railroad investments for his employer, The Prudential Insurance Company, and was personally involved in most of the railroad reorganizations of the 1930's and early 1940's. See Young (S) (Dec. 31, 1978) at 1-2.

67. *Id.* at 11-12. EL posited a July 1, 1974, disposition date. See Part X, *infra*.

68. Actually, Laurie used a "pre-tax" interest rate of 15 percent. Assuming a 50 percent marginal tax rate, this is the same as using a 7.5 percent after-tax rate.

69. Laurie explained only that a 15 percent pre-tax interest rate, the equivalent of a 7.5 percent after-tax rate, is "considered appropriate". Laurie (S) (AA) (Dec. 31, 1978) Ex, AA-JL-1 at 8.

70. Roll is a Professor of Finance at the Graduate School of Management of UCLA. He has published extensively and has served as Associate Editor of several journals in this field. See Roll (S) (Jan. 30, 1980) Ex. 1.

71. Richard Meyer is a Professor of Business Administration at the Harvard Business School where he has taught since 1965. His list of publications is both long and impressive. See Meyer (S) (Jan. 30, 1980) at App. 1.

72. Hallingby is Vice Chairman of Merrill Lynch and is former Chairman of White, Weld & Co.

73. Stewart Myers, a cross-town rival of Richard Meyer, is a Professor of Finance at the Sloan School of Management, Massachusetts Institute of Technology. Like Meyer, he has written extensively in this field.

74. The theory behind AWCC is the same as that behind the segmented earnings approach to valuation. See Gardner, The SEC and Valuation Under Chapter X, 91 U. Pa. L. Rev. 440, 460-64 (1943).

75. Even if we accepted Stewart Myers' approach in theory, we would have no reliable way of implementing it. Because railroad bonds, as opposed to stocks, are not frequently traded, Myers had to estimate their market values. He did this in two different ways and derived upper and lower bound estimates of their true values. See Myers (S) (Dec. 1, 1978) App. C. the GPs showed, however, that Myers' upper and lower bound estimates were too high and that, since he relied on this range of figures, his estimated debt ratio was also too high. See 8 GP at App. R 231-32.

76. Roll also argued that an acquirer would have used a 30 percent debt ratio. He contended that an acquirer of the IFLs would have used less debt than that used by the average railroad because it would not have been able to take full advantage of the tax benefits resulting from the IFLs' rehabilitation. Roll (S) (Jan. 30, 1980) at 113-17. Whatever the merits of this proposition, see Myers (S) (Oct. 15, 1980) at 41, the GPs have presented no evidence showing that acquirers of EL's LV's, AA's, or L&NE's lines would have been in a similar position.

77. Stocks, Bonds, Bills and Inflation: The Past (1926-76) and the Future (1977-2000) (1977).

78. Smith initially derived this rate for the IFLs. See Smith (S) (Jan. 30, 1980) at 65, 133-35. Based on his judgment, he assumed that the level of risk associated with the proffers of the individual Ts would be the same as for the IFLs. *Id.* at 252-53 (EL), 285-87 (LV), 292-94 (AA), 308-10 (L&NE).

79. The importance of the disposition date is essentially limited to the inflation factor since the real rate of return is derived from long-range historical data. To factor in inflation, one multiples the appropriate inflation factor by one plus the interest rate and then subtracts one.

The nominal rate of return for an average risk investment as of April 1, 1976 would therefore be 15.69 percent—1.092 x 1.0594 (the inflation factor) minus one.

80. For example, the fact that an industry is regulated does not necessarily imply that it is risky—utilities, among the most heavily regulated industries, historically have been regarded as being among the least risky.

81. EL makes much of its claim that it was different from the other bankrupts. In support of this, it points to the fact that its entry into bankruptcy was precipitated by a natural disaster and that "as late as 1974, EL was thought to be independently reorganizable". 2 ELF at 425. Yet the fact of the matter is that EL, like the other Ts, was ultimately found not to be independently reorganizable.

82. The GPs also presented testimony from five witnesses—Evan Allen, Senior Financial Analyst for Southern; Paul Zeis, Director of Research for Norfolk & Western; Frank Barnett, former Chairman of Union Pacific; Thomas Lamphier, current President of Burlington Northern; and Alan Boyd, former President of Illinois Central Gulf and current President of Amtrak—all of whom stated that an investment in the Ts' lines would have been viewed as riskier than investment in their own operations.

83. We conclude, *infra*, see p. 187, that the parties would have reached an agreement on the prices for the Ts' properties ten to twelve months after negotiations began in February 1973. For purposes of valuation, we will assume that potential acquirers would have valued the Ts' properties on January 1, 1974.

84. The GPs' witness, Roll, developed formulas which allow one to estimate the yield on railroad debt by factoring in its rating and the yield on U.S. Government bonds of comparable maturity. See Roll (S) (January 30, 1980) at 84-101. Assuming a 20 year term, the yield on A-rated senior mortgage debt as of January 1, 1974 would have been 9.155 percent and the yield on Aa-rated equipment trust certificates would have been 9.03 percent. Leaving aside the overall reliability of Roll's equations, we think that they yield unreliable results in this case. First, they fail to predict the actual yields which we have noted. Furthermore, the differential between the A and Aa-rated bonds is implausibly small.

85. In S&P's two reports, the proposed acquisitions are referred to at times by numbers known as proffer codes and at other times by Roman numerals. The table below identifies the proffer codes of the Ts whose RC and MOWE are discussed in this opinion:

Proffer Code	Proposed Acquisition
33	AA (Toledo-Ann Arbor segment)
35	R
82	EL I (Western Acquisition)
83	EL II (Chessie Acquisition)
86	EL III (Western Acquisition)
87	EL IV (Chessie Acquisition)
88	LV
89	LV III, IV (Historical)
42	LV III, IV (Projected)

1980 Study at VIII 5. The EL III and EL IV proffer codes cover the EL lines in the joint EL-LV acquisitions. The LV III and LV IV proffer codes cover the LV lines in the joint systems. The estimates designated by proffer code 89 are based on actual 1973 traffic on those LV lines, while those under proffer code 42 are based on the projected higher traffic after a combination with EL.

86. For example, EL estimated RC on its lines in the proposed Chessie acquisition to be about $27.76 million in 1973 dollars; S&P's figure was $148.299 million. See Statement of the EL Trustees in Response to the Court's May 21, 1981, Memorandum (June 1, 1981) at 11, Sp. Ct. Rep. at N 35810.

87. The 1979 Study developed RC including overhead for all lines of each T, expressed in 1974 dollars and premised on an assumed 1974 disposition date. It did not, however, cover either the scheduling of rehabilitation work or the development of annual MOWE. The 1980 Study developed RC and normalized MOWE without overhead for each of the Ts' proposed acquisitions, set out a schedule for the rehabilitation program, and expressed costs in 1973 dollars. In June 1980, Morgan made changes to portions of the 1980 Study's RC and MOWE estimates to account for newly discovered data and errors pointed out by the Ts during Morgan's deposition. See H. Morgan Corrections (S) (June 6, 1980).

88. Before his retirement in 1974, Morgan spent 38 years in various managerial and maintenance positions with the Penn Central Transportation Company, the Pennsylvania Railroad, and the United States Army. H. Morgan (S) (Jan. 31, 1979) at 1-3.

Gunderson, a licensed professional engineer, spent 26 years of his career directly and solely involved with bridges. He spent the remainder of his 43-year career supervising others who were directly involved in maintaining the facilities of the Western Maryland Railroad. Upon his retirement as Assistant Vice-President of Engineering in 1972, he served as a railroad consultant. Gunderson (S) (Jan. 31, 1979) at 1-3.

89. A work function is a quantification of the labor, equipment, and materials needed to perform a particular rehabilitation task. For example, one of the work functions defined the amount of labor, equipment, and materials needed to replace one mile of track with new 119-pound rail in one eight-hour work day. Most of the work functions developed by S&P are independent of one another and describe all the elements necessary to complete a particular rehabilitation task. Some work functions cannot be performed alone, however, and are combined with others to form a series of continuous operations. These groupings of work functions are called "work items". The methods used to derive the various work functions and work items are described in detail in the 1979 Study at V. For a listing of all the work functions and work items, see 1 1980 Study App. IV.

90. See 14 GP Supp. App. at 701-28. Because the figures on the pages cited do not reflect credits for the salvage value of replaced rails, the sum of all rail, turnout, and crossings rehabilitation for any particular proffer code will be higher than the figure for total track rehabilitation listed for that proffer in H. Morgan Corrections (S) (June 6, 1980) at Table VIII-2aA. Even if all the salvage credit were applicable to rail replacement, rail replacement would still be the dominant item of track rehabilitation.

91. In most instances, sound business practice dictates removal and relaying before safety considerations require removal, for if the rail is left in its first position too long, its life for some second-position uses will be too short to merit the cost of installation. As a result, the decision to remove and replace rail generally depends on a railroad's need for used rail. If mainline rail were destined for use in branch lines, it would be removed earlier than if destined for yard use, where even excessively worn rail has an extended useful life. 1 ELF at 160 n.118; H. Morgan (D) (Aug. 11, 1980) Ex. 134, EL App. E at 212.

In basing his rail replacement decision on the American Railway Engineering Association headwear standards, Morgan did not consider the needs of the Ts or their potential acquirers for used rail.

92. The AREA table is reproduced in the 1979 Study at III 30.

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93. Rail is manufactured in a number of different weights, expressed in pounds per yard of rail; the heavier the rail, the greater the allowable headwear.

94. See H. Morgan (D) (May 7, 1980) at 3036-41, EL App. D at 317-22. The S&P Study itself states, "Since the most economical rail use is to relay it in the next lower class, rail should be removed when the headwear approaches the value indicated in Table III-14". 1979 Study at III 31.

95. The S&P Study states, "The Table, of course, does not represent the actual minimum limits which indicate when rail must be removed from a track. It is, instead, a guide for indicating the class of track in which a given rail may be relaid." 1979 Study at III 27 to 28; see also 3 GPRB at App. A 42.

96. At Morgan's deposition, D. A. Diestelkamp, one of two assistants assigned to making rail replacement decisions, testified as follows:

> Q. Mr. Diestelkamp, when you had a piece of 140-pound rail in Class 1 which had a quarter-inch wear, would that be a strong indicator for you of removal? A. That would be one of the factors, yes.
>
> Q. Would that be a strong indicator, a major factor? A. It would depend on the other criteria that is [sic] listed in the Bechtel date.
>
> Q. I understand that. I think Mr. Morgan had said that wear is one of the important factors. A. That is correct.
>
> Q. In your work didn't you regard this quantitative measurement as a major indicator of a need to replace? A. That is correct.
>
> Q. And when you found out the wear reached a quarter of an inch in Class 1, in most cases you replaced that rail, did you not? A. That's true.
>
> Q. If we were to go through all of these forms, we would find out that you replaced virtually all of the rail that exceeded that limit; isn't that correct? A. Within the confines of what you just stated, yes.

H. Morgan (D) (Apr. 14, 1980) at 202, El App. C at 24-25.

97. Class IV lines, which are yard lines, were considered separately.

98. Morgan did not have Bechtel Study data for all the lines in the EL Western acquisition. See 1979 Study at IV 10-11.

99. Tables showing the FRA track classifications and limits on allowable end batter and mismatch can be found in the 1979 Study at III 5, III 26. The standards used by Morgan, extrapolated from the FRA figures, are shown *id.* at III 41.

100. To the extent that Morgan overstated rail replacement, he also substantially overstated total track RC. It is possible, of course, that, even if he had chosen not to replace particular stretches of rail, those stretches would have required some other forms of rehabilitation. The GPs make essentially this sort of argument, although in a different context, with respect to AA. See 3 GPRB at App. A 83. Nonetheless, the unit costs for the various work functions and work items related to rail replacement are so much larger than those for other forms of tracks rehabilitation that the choice of one of the latter instead of one of the former would have reduced track rehabilitation costs considerable. *Compare* 2 1980 Study App. at IV-1-1 to IV-1-10, IV-2-1 to IV-2-2 *with id.* at IV-1-11 to IV-1-17, IV-2-2 to IV-2-3.

101. The GPs attack EL's attempt to rely on the Bechtel Study rail replacement estimates as proof of the excessiveness of Morgan's rail replacement estimates. The Bechtel Study estimates were prepared by the engineering firm of Deleuw, Cather & Co. under the technical direction of Bechtel, Inc. The GPs argue that the DeLeuw team incorrectly used the sample data they had obtained from visual inspections of EL's lines. See 1 GPRB at E 35-40. As the GPs acknowledge, their argument is based on a statement by EL's counsel about how DeLeuw used the sample data. As far as we can tell, neither party introduced evidence concerning the complete methodology DeLeuw used in making rail replacement decisions.

Nevertheless, at least one piece of information about DeLeuw's methods is known. It is generally agreed that DeLeuw inspected samples of track at two-mile intervals. EL counsel asserted that, unlike Morgan (who used the DeLeuw data in his study), DeLeuw did not treat the sampled portion as necessarily representative of conditions throughout the two-mile interval. Instead, they looked at other track records to determine whether conditions on the unsampled portion (*e.g.*, the rail's installation date, the curvature of the track if any, etc.) were similar to conditions on the sampled portion. The GPs argue that this method understated rail replacement because if the sampled portion showed deterioration, DeLeuw replaced only that part of the unsampled portion where conditions were similar to conditions on the sampled portion; on the other hand, where the sampled portion was good, DeLeuw did not replace any rail even though it is possible that only a short distance beyond the sampled portion deterioration was such that replacement was needed.

We see no basis for that assumption about DeLeuw's rail replacement methodology. If DeLeuw supplemented its visual inspections with additional track records, it is just as likely that they could have determined that, because conditions on the sampled and unsampled portions were dissimilar, rail replacement was needed in the unsampled portion even though it was not needed in the sampled portion. Although we cannot know for sure how DeLeuw made its rail replacement decisions, if their method did take into account additional data besides that obtained from visual inspections, then it is likely to be more reliable than Morgan's method of treating each sample as representative of an entire two-mile stretch of rail.

The GPs also point out that, even if DeLeuw's rail replacement percentages are significantly lower than Morgan's, DeLeuw's total rehabilitation estimate for all non-bridge items is significantly closer to Morgan's figures for those items than it is to EL's figures. As the Chessie Study points out, however, see Chessie Study at 14-22, EL App. B at 217-18, DeLeuw probably overstated rehabilitation in a number of ways. Indeed, Chessie felt that DeLeuw's estimate should be discounted by at least 40 percent. Chessie Study at 26, EL App. B at 220. As a result, we do not find the similarity between DeLeuw's and Morgan's rehabilitation figures for non-bridge items very probative.

102. Total costs for turnout and highway crossings replacement (before salvage credit) for each T are as follows:

AA	$ 287,015
R	$ 1,517,512
EL I	$10,658,020
EL II	$ 8,994,707
EL III	$ 9,607,427
EL IV	$ 7,771,870
LV	$ 4,147,221
LV, III, IV	$ 3,167,955

See H. Morgan (D) (Aug. 22, 1980) Ex. 280, EL App. E at 278-81. The Roman numerals for EL and LV signify the various alternative configurations they proposed depending on which railroad or public entity acquired their lines. See note 85, *supra.*

103. The Bechtel Manual, a guidebook provided to the six subcontractors who did the field work for the Bechtel Study, originally specified sampling rates as high as 50 percent for some types of bridges; sampling rates for other types of bridges ranged below that figure to as low as 5 percent. See Gunderson (D) (May 15, 1980) Ex. 10 at 6-5, EL App. G

at 185. Apparently, these rates were later cut in half. *Compare id. with* 1 1979 Study App. at III-2-1.

104. The Bechtel field forms for bridges contained three possible designations for the condition of each item specified on the form: A (good), B (fair), R (repair). The Bechtel Manual defined the B category as follows: "The second answer [fair] should be used when the inspector believes that the item could develop a problem in the future and should be watched, but no repairs are merited at the present time." Gunderson (D) (May 15, 1980) Ex. 10 at 6-7, EL App. G at 187. Gunderson's interpretation of the B rating appears to have been at odds with this definition. Under his interpretation, even bridges with some B ratings and no R ratings were scheduled for repairs. See 1980 Study at IV 28; Gunderson (D) (May 16, 1980) at 458-60 (by R.A. Wokurka), EL App. F at 56-58.

105. Although there was enough data on PC yards to allow Morgan to use a separate sample to determine PC's yard rehabilitation estimate, Morgan did not have enough data to use separate samples for the other Ts. See 3 GPRB at App. A 27-29.

106. The number of miles in mainline track determined S&P's figures for each T's yard track mileage and yard turnouts. To obtain figures for each T's yard track mileage and yard turnouts, S&P used Conrail's systemwide ratios for the number of yard track miles to mainline miles and for the number of yard turnouts to yard track miles. H. Morgan (D) (Apr. 23, 1980) at 1611-13, EL App. C at 240-42. Some modifications to this approach were made in the 1980 Study; they did not affect EL, LV, and AA. H. Morgan (D) (Apr. 23, 1980) at 1614-16, EL App. C at 245.

107. For EL, replacement costs (before salvage credit) for small yard turnouts on each of its four proffers ranged from $4,061,333 to $6,371,844. For LV, the figure was $3,745,611. See 1 ELF at 212.

108. Section 215 of the Rail Act, 45 U.S.C. § 725, provided funds for interim maintenance and improvements pending conveyance of the Ts' properties to Conrail.

109. See note 25, *supra*.

110. Shannon (S) (EL) (Dec. 31, 1978) at 52-54. Shannon defined his standard as follows:

> Generally, one can consider that a railroad in "50%" condition is in good operating condition. For example, if the anticipated tie life is 35 years, at the end of 17½ years the ties are in 50%

condition but can still adequately perform the function for which they were installed.

Id. at 52. This standard appears to be the generally accepted interpretation of normal condition. See 3 GP at K 39 n.17.

111. Shannon (D) (July 9, 1979) at 1004-06, EL App. B at 1-3. In its brief EL incorrectly states that Chessie's figure was stated in 1975 dollars. 1 ELF at 135. Shannon testified however that, although the Chessie Study used 1975 freight rates, it used projected 1976 cost levels. Shannon (S) (EL) (Dec. 31, 1978) at 82. EL quotes Shannon on this point earlier in its brief. See 1 ELF at 46. The evidence cited *id.* at 46 n.37 is sufficient to prove that Shannon was correct.

112. The pro forma statements prepared by Shannon for each acquisition contained two maintenance accounts, — catch-up maintenance, and "normalized maintenance". There was no separate account for routine yearly maintenance. That cost was reflected in the figure for net operating income and was based on actual 1973 expenditures. "Normalized maintenance" represented the amount of additional maintenance expenditures that should have been incurred in 1973 to avoid deterioration. Put another way, "normalized maintenance" plus the sum actually expended for maintenance in 1973 would, in Shannon's opinion, keep EL in optimum operating condition once catch-up maintenance had been performed. Catch-up maintenance was merely the cost to rehabilitate the lines to optimum operating condition.

113. To use an example employed in LV's examination of Murphy, if a railroad decides to lay 119-pound rail instead of 136-pound rail in its rehabilitation program, its annual MOWE budget should be adjusted to account for the fact that the lighter rail wears faster and will have to be replaced sooner than the heavier rail. B. Murphy (D) (June 20, 1980) at 138-39, 2 LV App. at 262-63.

114. In the Statement of the Erie Lackawanna Trustees in Response to the Court's May 21, 1981, Memorandum (June 1, 1981) at 9-12, Sp. Ct. Rep. at N 35808-11, EL points out three errors in the GPs' calculations: (1) the Chessie figures used by the GPs covered a package of lines that is 5.8 percent larger than the package EL's estimate covered; (2) Chessie's rehabilitation figure did not contain an adjustment for shortfall that EL's estimate contained; and (3) Chessie's figures were not accurately restated in 1973 dollars because the GPs incorrectly assumed that Chessie's figures were stated in 1975 rather than 1976 dollars. This error by the GPs was perhaps induced by EL's opening brief which incorrectly stated that the Chessie study expressed rehabilitation in 1975 dollars. See note 111, *supra.*

EL also takes issue with the figure the GPs assigned as EL's estimate of annual MOWE. Annual MOWE is not stated separately in Shannon's study and cannot be computed without complicated calculations. The GPs therefore used a rough approximation. 1 GPRB at E 26 n.80. EL's own rough approximation is about $1.6 million higher. Multiplied by ten, the difference in the two estimates is substantial. Nevertheless, even accepting the GPs' figure for the EL estimate, but correcting for the three other errors discussed above, the combined rehabilitation and ten-year MOWE figure using EL's estimate of the combined total is 79 percent of Chessie's estimate, while the GP's estimate is 160 percent of Chessie's estimate.

115. The GPs came up with the following figures for the total costs of rehabilitation plus ten years of routine annual MOWE: $431,300,000 using S&P's estimates, $318,643,000 using Chessie's estimates, $203,878,000 using Shannon's estimates. As modified to correct the errors EL found in the GPs' calculations, the figures look like this: $431,300,000 using S&P's figures, $269,118,000 using Chessie's figures, and $229,080,000 using EL's figures.

116. For example, if most wage increases occur around March, Shannon's January 1, 1975, cost levels would reflect the March 1974 increase. The AAR 1974 indices would therefore be an accurate indicator of the actual cost levels Shannon used since those indices provide year-end 1974 figures and Shannon's January 1, 1974, figures would contain no wage increases not contained in the AAR index. the 1973 AAR indices would reflect the 1973 post-March labor costs and thus would accurately reflect the costs obtaining during the maintenance season (March through October). The proper comparison would therefore be between the 1974 and 1973 AAR indices, a one-year adjustment rather than the two-year adjustment Shannon made.

117. See note 108, *supra*.

118. The Adik study that valued all LV lines conveyed to Conrail use a computerized costing model to determine revenues, expenses, and capitalized earnings value. The study does not provide discrete figures for RC and MOWE: rather, those costs are buried in a number of different accounts. The parties have not attempted to extract from the study the pertinent figures for RC and MOWE for the LV lines in the combined systems. We have not been able to determine how to extract them ourselves. See generally Adik (S) (December 31, 1978) Ex. 1.

119. LV's traditional procedures and equipment were older and less efficient than the procedures and equipment employed by the USRA in the § 215 program undertaken in 1975 and Adik believed that similar work techniques and machinery would also have been used by a solvent acquirer.

120. Murphy also testified that the figures presented by the S&P Study were a more reliable indicator of LV's needs. B. Murphy (S) (Jan. 30, 1980) at 14. We hesitate to rely on this statement, however. Murphy endorsed S&P's original estimate of $62.35 million for the RC of the LV lines in the EL-LV proffers. When Morgan and Gunderson subsequently revised their estimate of RC for LV to $52.99 million Murphy endorsed the reasonablness of that figure without even examining the errors that they corrected. B. Murphy (D) (Aug. 29, 1980) at 193-207, 2 LV App. at 280-86. Murphy explained at his deposition that the two S&P figures represented a reasonable range of estimates. But his written testimony made no such qualification. And his deposition also revealed that he was generally unfamiliar with the way in which Morgan and Gunderson conducted their studies. B. Murphy (D) (Aug. 29, 1980) at 216-18, 222-31, 2 LV Supp. App. 295-97, 301-09. In light of all this, we do not find Murphy's endorsement of the S&P Study to be especially probative.

121. S&P placed rehabilitation on LV's lines in the combined EL-LV systems at $44.65 million and annual MOWE at $6.871 million. H. Morgan Corrections (S) (June 6, 1980) at Tables VIII-2aA, VIII-2bA. Adik placed rehabilitation at $7.775 million and annual MOWE at $9.766 million. Adik (S) (EL) (Dec. 31, 1978) Schedules 11 and 14.

122. The following figures are approximations of the cost per main-line track mile for EL and LV: EL—$11,000; LV—$14,204. The EL figure was developed by taking the figure for total rehabilitation (with § 215 adjustment) on EL's lines in the EL-LV Western acquisition as presented in Memorandum of the EL Trustees in Response to the Court's Letter of June 19, 1981 (July 10, 1981) at Table A (following p. 11), Sp. Ct. Rep. at N 36164, determining the proportionate share (with § 215 adjustment) attributable to the cost of rehabilitating JT lines, and dividing by the total mileage figure for Proffer Code 86 in the 1980 Study at VIII 5. LV's figure is the $7.775 million estimate from Adik (S) (EL) (Dec. 31, 1978) Schedule 14, divided by LV's mileage figure in the 1980 Study at VIII 5.

123. Hale did not analyze how a reduction in speed would affect any track rehabilitation estimates other than rail replacement.

124. The entire exchange on this point was as follows:

Q. If you look at the computer printout for line 6903, you are showing a net total rehabilitation figure of $487,000, and this represents rehabilitation to a maximum speed of 40 miles per hour; correct? A. Correct.

Q. Based upon the fact that, under the assumptions made by the Ann Arbor in the rail use case, this line would only be operated at 25 miles an hour, could you tell me—could you tell the difference in rehabilitation costs that would be provided solely for an FRA Class II railroad? A. Not offhand.

Q. Would it be more than 50 percent? A. You mean 50 percent less?

Q. 50 percent less. A. No.

H. Morgan (D) (Aug. 19, 1980) at 4574, 28 GP Supp. App. at 346.

125. Indeed, given Morgan's tendency to overstate RC, it is likely that Hale's use of stricter standards overcompensated for his short-term perspective.

126. The figures for mainline ties and turnouts were calculated from Hale's estimates for the segments of AA from Toledo to Diann and from Diann to Whitmore Lake, making an adjustment because the Diann-Whitmore Lake segment extends 9.5 miles beyond the Ann Arbor city limits, Hale (S) (Dec. 31, 1978) at 3.

Mainline Ties

Toledo-Diann:

Units	*Unit Cost*	
400	$25	$10,000

Diann-Whitmore:

Units	*Unit Cost*	
8500 / 36.5 miles = 6288 x (36.5 - 9.5) miles	$20	$125,760
Total		$135,760

Appendix H

Turnouts

Toledo-Diann:		
Units		
0	$0	
Diann-Whitmore:		
Units		
10 x (36.5 - 9.5) miles		
36.5 miles = 8		
	$7,500	$60,000
Total		$60,000

See Laughlin (S) (Dec. 31, 1978) Ex. AA-MOL-1 at B 2-3.

127. See p. 86, *supra*.

128. The EL ratio, as calculated by EL from its Schedule 411 data, is 46 percent, while Conrail's systemwide ratio is 53.4 percent. 1 ELF at 284, 219. EL's ratio is about 14 percent lower than Conrail's. EL incorrectly quantified the difference as 15 percent. See 1 ELF at 284. A 14 percent reduction in yard maintenance on EL's Western acquisition amounts to $1.25 million. See H. Morgan Corrections (S) (June 6, 1980) at Table VIII-2bA. EL also contends that Morgan overstated mileage by treating some lines as double track lines instead of single track lines. 1 ELF at 284. EL did not quantity the amount of overstatement, however, so we presume that this error, like the 43-mile error relating to a line maintained by B&O, *id.*, was not significant.

129. EL had no lines with densities above 20 MGT, see 3 GPRB at App. A 46-47, so according to the 1980 Study, none of its rail had an annual replacement rate over 2.5%, and some had an even lower rate. The 2.5 percent figure contemplates a 40-year rail life because at that rate all the rail in a given line will have been replaced at an average of once every forty years.

130. *E.g., Susquehanna & N.Y.R.R.—Abandonment*, 252 I.C.C. 81 (1942); *Cisco & N.E. Ry.—Abandonment*, 267 I.C.C. 139 (1947); *Black Mountain Ry.—Abandonment*, 290 I.C.C. 238 (1954); *Manistee & Repton R.R.— Abandonment*, 324 I.C.C. 489 (1964); *Okmulgee Northern Ry.—Abandonment*, 320 I.C.C. 637 (1964); *Tennessee Central Ry.—Abandonment of Operations*, 333 I.C.C. 443 (1968), *modified*, 334 I.C.C. 235 (1969); *Bush Terminal R.R.—Entire Line Abandonment*, 342 I.C.C. 34 (1971); *Northampton & Bath R.R.—Abandonment*, 354 I.C.C. 784 (1978). The ICC, in situations

similar to those in the foregoing cases, has imposed labor protection conditions, *e.g., Seaboard Air Line R.R. Trackage Rights*, 312 I.C.C. 797 (1962); *Washington & Old Dominion R.R. Abandonment—Virginia*, 331 I.C.C. 587, *complaint dismissed sub nom. Washington & Old Dominion Users Ass'n v. United States*, 287 F.Supp. 528 (E.D. Va. 1968). Although the distinctions drawn by the Commission are not altogether clear, it appears that protective conditions have been imposed only in situations where a parent corporation derives substantial benefits from the abandonment of its subsidiary's lines. We think the ICC would have found this exception inapplicable if, in the alternative scenario, a T abandoned its entire system for scrap value.

131. See, *e.g., In re Chicago, Rock Island & Pacific R.R.*, No. 75 B 2697 (N.D. Ill. June 5, 1980) Partial Transcript of Proceedings at 4 ("that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept") (McGarr, J.), *application for stay denied sub nom. Railway Labor Executives' Ass'n, v. Gibbons*, 448 U.S. 1301 (1980) (Stevens, J.) and 448 U.S. 909 (1980) *decision on probable jurisdiction postponed and case consolidated with No. 80-1239*, 49 U.S.L.W. 3806 (U.S. April 27, 1981) (No. 80-415); and *In re Chicago, Rock Island, & Pacific R.R.*, No. 75 B 2697 (N.D. Ill. Oct. 15 & 16, 1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. Gibbons*, Nos. 80-2487 & 80-2536 (7 Cir. Dec. 16, 1980) (by an equally divided *en banc* court), *probable jurisdiction noted and case consolidated with No. 80-415*, 49 U.S.L.W. 3806 (U.S. April 27, 1981).

132. The GPs argue briefly that the Penn Central Merger Protection Agreement (PCMPA) would have been applicable to LV and AA as direct or indirect subsidiaries of PC, although they do not attempt to calculate the costs of the benefits of the agreement. 5 GP at S 46. LV rightly points out that the PCMPA required PC, and not LV, to bear responsibility for labor protection payments. See *Pennsylvania R.R.—Merger—New York Central R.R.*, 347 I.C.C. 536, 551 (1974). Moreover, our conclusions as to the uncertainty that would have surrounded the applicability of the Erie Lackawanna Merger Protection Agreement, see pp. 106-09, *infra*, also apply to the PCMPA. Accordingly, we accept LV's argument that the PCMPA would have had no effect on its labor protection costs. The same considerations apply to AA.

The GPs apparently also contend, 5 GP at S 47, that the February 7, 1965 Job Stabilization Agreement would have applied to EL and LV in

the circumstances of the proffered transactions, although the GPs again do not consider this agreement in their calculation of the Ts' labor protection costs. The agreement applied only to nonoperating employees employed by a T on October 1, 1962. Because employees generally would have been terminated in reverse order of seniority and most 1962 employees would have achieved relatively high seniority by 1973-74, the agreement would have had little practical effect on the Ts' labor protection costs. In any event, our conclusions regarding the uncertainty that would have surrounded the question whether the Erie Lackawanna Merger Protection Agreement was applicable to the proffered transactions, see pp. 106-09, *infra*, are equally applicable to the February 7, 1965 Job Stabilization Agreement.

The GPs also argue briefly, 5 GP S at 253-56, that other agreements with third parties—such as equipment financing obligations, fuel contracts, and the like—would have reduced the price of the Ts' properties. As regards the Ts remaining in the case, virtually no evidence has been presented in support of this theory. Moreover, the GPs cite us to no transaction comparable to those proffered in which such agreements have affected the purchase price. Accordingly we reject the GPs' argument.

133. The GP's argument, 2 GPRB S at 112 n.277, citing Minutes of May 13, 1936 at 5; 22 GP Supp. App. at 289 (statement of Mr. Harrison), that the WJPA negotiation minutes "reveal an intent to cover all attempts to unify 'by a device'" is unpersuasive. The portions of the negotiations cited by the GPs reveal only an attempt to prevent circumventions of the WJPA, and not an explication of the scope of that agreement.

134. We are unpersuaded by the conclusory statements of the GP's witness, Dr. Jacob Seidenberg, that a neutral arbitrator would have found the WJPA applicable in the circumstances of the alternative scenario. Seidenberg (S) (Jan. 31, 1979) at 36-37. As the GPs concede, Seidenberg did not consider the particular circumstances of the Ts' cases nor the arguments that the Ts might have advanced in arbitration. 5 GP at S 81; Seidenberg (D) (Apr. 10, 1980) at 122, EL App. M at 203.

135. EL's inclusion in the Norfolk & Western system was accomplished by Norfolk & Western's purchase of EL's stock, which Norfolk

& Western regarded as a complete loss following EL's entering reorganization. See also *Matter of Erie Lackawanna Ry.*, 404 F.Supp. 954 (1975).

136. The most generous type of labor protection is "attrition protection", which guarantees employment or its equivalent in wages and fringe benefits until an employee dies, retires, resigns, becomes disabled, or refuses to accept a bona fide job opening. The ELMPA, the PCMPA, and other agreements provided attrition protection for covered employees.

137. See cases cited in note 130, *supra*.

138. We do not think that the refusal of labor unions to reach agreements with Chessie and Southern regarding acquisition of the EL system and PC's Delmarva lines indicates that labor would have blocked the proffered transactions. In the event that the Chessie and Southern acquisitions failed, the EL and PC lines were to be acquired by Conrail, and the employees on these lines would receive the extremely favorable labor protection benefits provided by the Rail Act. In the alternative scenario, labor would have had no such protection and would have faced the possibility of widespread shutdowns in the Northeast.

139. Amtrak C-1 benefits, negotiated pursuant to the Rail Service Passenger Act, 45 U.S.C. § 565, and incorporated in the 1971 Passenger Service Agreement between Amtrak and Penn Central, provide dismissed employees with a choice of a lump sum separation payment or a monthly dismissal allowance equal to 100 percent of their base period salary for up to six years following termination. Ex. GPS—Labor 27. We do not think this agreement is particularly instructive in our case. The Rail Service Passenger Act provided labor with a guaranteed level of benefits, 45 U.S.C. § 565(b), and the availability of federal intervention made it highly unlikely that the Ts would actually cease operations.

140. LV contended that it would have avoided any labor protection obligations, as did AA. Shannon took the view that labor would have "panicked". Shannon (D) (Jan. 15, 1981) at 652, 30 GP Supp. App. at 179.

141. The Rock Island and Milwaukee liquidations gave rise to agreements between labor and the potential purchasers of the lines involved regarding labor protection. These agreements — the "Miami accords" — provided 80 percent of base period compensation for up to three years for employees hired on the Rock Island and Milwaukee

systems. As the GPs recognize, 2 GPRB at S 85 n.216, these terms were less than those labor historically had obtained. The GPs point out, however, that workers who failed to find employment on the Rock Island and Milwaukee lines were protected by special federal legislation. 2 GPRB at S 80 & n.201. The restructuring of the Rock Island and Milwaukee nonetheless involved labor "concessions . . . in the amount and duration of salary guarantees", 2 GPRB at S 85 n.216, and, although coming several years after the transactions hypothesized in this case, belies the GPs' claims of an uninterrupted trend towards increased labor protection. See also *R.D. Timpany, Trustee of the Central R.R. Co. of New Jersey—Abandonment of Operations between Phillipsburg, N.J. and Hudson, Pa.*, 342 I.C.C. 227, 301 (1972) (minimal labor protection benefits imposed in partial line abandonment).

142. If labor protection costs exceeded the excess value of rail use sales over scrap values, then it would be more profitable for a T to choose to scrap, thus avoiding labor protection costs. See pp. 103-04, *supra*.

143. Considerations that would have influenced the outcome of negotiations between the Ts and labor would have included the bargaining skill of the various parties, the parties' perceptions of the willingness of other parties to risk blocking rail use sales, and the parties' perceptions of the value of rail use sales. We do not attempt to quantify such intangibles.

144. The ICC devised the *New Orleans* conditions in response to the Supreme Court's direction in *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950), that it provide a "fair and equitable arrangement" pursuant to § 5(2)(f). See *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, 281-82 (1952).

145. See examples cited in Ables, *supra*, at 136-37.

146. Kasher, a lawyer specializing in labor law, has held numerous positions in the railway labor field. He served as General Counsel on the National Mediation Board, as director of Conrail's Title V Administration, and has been employed as a consultant and labor arbitrator. Kasher (S) (Nov. 1, 1979) at 1-3. He had not, however, had any real experience in the computation of labor protection costs prior to this case. Kasher (D) (May 5, 1980) at 42, I LV App. I at 60.

147. A "nonagreement employee" is an employee unprotected by existing agreements.

148. Kasher estimated that 3,575 PC, 348 EL, and 139 LV nonagreement employees would have been terminated as a result of the proffered transactions.

149. If we were to conclude that more positions would have been lost following acquisition than the T's Pro Formas reflect, we would then be required to reduce the T's projected labor expenses. Because LPCs for an employee are less than the cost of retaining the employee in employment this would only benefit the Ts.

150. The PC "refined case" was devised by PC witness Edward Jennison, Jennison (S) (PC) (Dec. 1, 1979) at 29-31, simply to test the profitability of PC's IFLs assuming relatively extensive abandonments by the other Ts. No evidence was submitted that the "refined case" would have been the likely disposition of the Ts' lines in the absence of the Rail Act.

151. This result follows from our conclusion, p. 259, *infra*, that there would have been several Western lines bidding for the EL-LV Western package and Chessie bidding for the EL-LV Chessie package. If a Western line bid would have been higher than the Chessie's bid then we obviously do not have to estimate LPCs for the Chessie. On the other hand, if the Chessie, taking into account the X of the Chicago-Sterling line, would have been willing to pay more than any Western acquirer we again need only consider the LPCs to a Western acquirer because Chessie would have only have had to pay a nominal amount more than that the Western acquirer would have bid.

152. See, *e.g.*, Kasher (D) (Aug. 13, 1980) at 1884 (by Rybicki), EL App. M at 13; Kasher (D) (Aug. 13, 1980) at 1837 (by Willey), EL App. L at 304; Kasher (D) (May 6, 1980) at 262 (by Willey), EL App. L at 38; Kasher (D) (May 6, 1980) at 266 (by Willey), EL App. L at 39; Kasher (D) (Aug. 13, 1980) at 1860-63 (by Willey), EL App. L at 322-25; Kasher (D) (Aug. 13, 1980) at 1868-74 (by Willey), EL App. M at 1-7; Kasher (D) (Aug. 13, 1980) at 1892-98 (by Rybicki), EL App. M at 17-22; Kasher (D) (May 6, 1980) at 83 (by McDonough), EL App. L at 3.

153. See, *e.g.*, Kasher (D) (Aug. 13, 1980) at 1876-78 (by Willey), EL App. M at 9-11; Kasher (D) (Aug. 13, 1980) at 1839-49, 1860-63 (by Willey), EL App. L at 306-16, 322-25.

154. See Kasher (D) (Aug. 13, 1980) at 1850 (by Willey), EL App. L at 317; Kasher (D) (Aug. 13, 1980) at 1889 (by Rybicki), EL

App. M at 16; Kasher (D) (May 6, 1980) at 266 (by Willey & Rybicki), EL App. L at 39. See also Kasher (D) (May 6, 1980) at 256-58 (by Willey), EL App. L at 35-39; Kasher (D) (Aug. 13, 1980) at 1853-54, EL App. L at 318-19; Kasher (D) (May 6, 1980) at 226, EL App. L at 31.

155. A number of Shannon's assignments with Wyer, Dick & Co. involved labor and labor protection matters. Shannon (D) (June 21, 1979) Ex. 2, EL App. A at 1-6. See also note 25, *supra.*

156. The 1,819 figure was derived from Exhibit 16 based on the following methodology: addition of sheet 1, column 1, line 7 (14 positions); sheet 2, column 1, line 8 (166 positions); sheet 3, column 1, line 11 (39 positions); sheet 4, column 1, lines 7 & 28 (0 positions); sheet 5, column 1, line 6 (2 positions); and sheet 6, column 1, line 11 (97 positions), gives a total of 318 positions. Application of this method to the remaining years yields a total of 1,819. This figure includes the positions that Shannon concluded would have been eliminated from EL's rehabilitation and capital improvement programs. Although Shannon's workpapers net jobs abolished against those created, we have not done so, to reflect difficulties in relocating surplussed employees. For example, for year 2, addition of sheet 1, column 2, line 7 (41 positions); sheet 2, column 2, lines 8, 13, 14 & 16 (213 positions); sheet 3, column 2, line 11 (73 positions); sheet 4, column 2, lines 6 & 27 (5 positions); sheet 5, column 2, line 6 (15 positions); sheet 6, column 2, line 11 (196 positions) gives a total of 543 positions.

157. For purposes of ICC reporting, a carrier's workforce is divided into groups by type of employment: executive (Group I); professional and clerical (Group II); MOW (Group III); Maintenance of Equipment (Group IV); and Transportation (Groups V, VIa, and VIb).

158. See Shannon (D) (Feb. 11, 1981) Ex. 16 at sheets 1-6, EL App. N at 517-23; Kasher (S) (Nov. 1, 1979) at 26; Grotz (S) (Oct. 15, 1980) at 24-25; *Pennsylvania R.R.—Merger—New York Central R.R.*, 327 I.C.C. 475, 689 (1966).

159. See note 156, *supra.*

160. Application of a 10.4 percent attrition rate to the total number of El operating employees, as reflected in sheets 1-6 of Exhibit 16 to Shannon's deposition, produces the figures in Table 2. For example, addition of the figures (to the left of column 1) at line 10, sheet 1; line 23, sheet 2; line 14, sheet 3; lines 11 & 32, sheet 4; line 9, sheet 5; and

line 20, sheet 6, produces 9232 total EL operating employees. Thus, 9232 x 10.4% = 961, as appears in Table 2.

161. The figures in Table 3 are derived from Exhibit 16, at sheets 1 and 6, EL App. N 517 & 23. For example, examination of column 1 in sheets 1-6 indicates that 616 new jobs would have been created in year 1 in ICC Group III, Shannon (D) (Feb. 11, 1981) Ex. 16 at sheet 2, EL App. N at 518.

162. We do not attempt to reflect the attrition of employees from the surplus pool due to death. This decision reflects both the fact that this factor would have had only a small impact and the fact that an acquirer would have made a conservative estimate of its LPC liability.

163. Although a considerably higher proportion of Conrail employees chose monthly dismissal payments under the Rail Act, this experience is of little relevance to this case. While the Rail Act's provisions regarding monthly dismissal allowances, Rail Act § 505, are more favorable than those of the *New Orleans* benefits, there is little difference between the lump sum provisions of the two types of protections. Moreover, we believe EL would have both announced and demonstrated its ability to police the outside earnings deduction, thus making monthly dismissal allowances even less attractive. Our calculations are based on Shannon (D) (Feb. 11, 1981) Ex. 16 at sheets 28-35, EL App. N at 544-50, and the figures for average yearly compensation contained therein.

164. Grotz's figures indicate that even the less senior LV workers tended to have worked for the railroad for longer than five years. Thus, even those employees opting to receive dismissal allowances would have fallen primarily into the 5+ year category. Grotz (S) (Oct. 15, 1980) at Table 4, 5. See also I FSP at 164 (employees with less than five years service constitute less than 15 percent of railroad workforces).

165. The figures in Table 21 are derived from Shannon's workpapers, 999020-43, EL App. N at 628-39, and testimony, Shannon (S) (Oct. 15, 1980) at 21-22. For example, with respect to MOW, line 15 of 999020, EL App. N at 628, indicates a reduction in labor expenses of $240,525, which, when divided by the average MOW yearly salary, lines 7-8, reflects a reduction in employment positions in year 1 of 19 employees. Figures for Traffic and General departments derived from Shannon's testimony, *id.*

166. According to our calculations the ratio would have been 45 percent in year 1; 45 percent in year 2; 10 percent in year 3; and 0 in year 4.

167. Figures for total size of EL's nonoperating workforce derived from Shannon workpapers 999020-43, EL App. N at 628-39. For example, 127 MOW employees (999020, line 8), 93 maintenance of equipment employees (999023, line 7), 153 transportation employees (999027, line 6), 297 traffic employees (Shannon (S) (Oct. 15, 1980) at 21 (164 nonunion + 133 union = 297)), and 650 general employees (Shannon (S) (Oct. 15, 1980) at 21-22) provides a total of 1320, less 126 unprotected employees, leaves 1194.

168. Base period salaries derived from Shannon's workpapers 999020, line 30; 999023, line 29; and 999027, line 29, EL App. N at 628, 631, 635. Average protected employee's 1973 salary, based on these figures and adjusted upwards to reflect higher salaries of General and Traffic employees, see "Erie Lackawanna Railway Company, Black Book", Shannon (D) (Feb. 12, 1981) Ex. 26, EL App. N at 583, estimated to be $11,750. Adjustment for real increases in railroad wages, see Table 8, provides a 1975 salary of $12,320; a 1976 salary of $12,620; a 1977 salary of $12,920; and a 1978 salary of $13,230. Adjustments of these figures to reflect appropriate base period salaries, see Table 9, produces the following figures: 4/75—4/76, $12,419; 4/76—4/77; $12,719; 4/77—4/78, $13,022. No downward adjustment of salaries, as was used in Table 9, is applied in this context because the dismissal of a large number of nonoperating employees would have reduced the impact of seniority on the average salary of dismissed nonoperating employees.

169. Figures in Table 31 derived from Tables 24 (years 1-6) and 28 (year 7).

170. Grotz has held positions as Vice President of the Chase National Bank's Transportation Department and as President and Chief Executive Officer of Western Maryland Railway Company. Since 1969 he has been employed as a railroad consultant. Despite his extensive experience in the railroad business generally, he had never conducted a LPC study prior to submitting his statement in this case.

171. Our LPC calculations, which are based on Grotz's study, indicate that LV's LPCs pursuant to *New Orleans* benefits would be slightly larger than Kasher's projections for comparable benefit levels. This is

attributable to the different assumptions adopted by Kasher and Grotz regarding the numbers of employees who would have been dismissed because of the proffered transaction. Kasher's other projections of LV's total LPCs were substantially higher than Grotz's.

Grotz excluded employees aged 64 or older and nonagreement employees from his calculations. Grotz (D) (Jan. 24, 1981) at 462, 25 GP Supp. App. at 80. We accept his conclusion for several reasons. As in the case of EL, we think the number of nonagreement employees provides a fair estimate of the number of unprotected employees. Although LV would likely have incurred some costs as a result of requiring or encouraging, 2 GPRB at S 61, the retirement of employees aged 64 or older, we are aware of no evidence of the extent of these costs. In any event, we accept Grotz's treatment of this issue in an effort to reflect the reduction in LPCs that a 1976 acquisition date would have produced, see note 175, *infra.*

172. Alternatively, we think an acquirer would have applied a lower attrition rate—with much the same effect on LV's LPCs. For example, the average attrition rate for B&O in 1973 was 6.74 percent, Shannon (D) (Feb. 12, 1981) Ex. 23, EL App. N at 554, for C&O in 1973 it was 7.36 percent, Shannon (D) (Feb. 12, 1981) Ex. 24, EL App. N at 567 and for Norfolk & Western in 1973 it was 6.89 percent, Shannon (D) (Feb. 12, 1981) Ex. 25, EL App. N at 576. Either of these adjustments would have reflected an acquirer's reluctance to underestimate the difficulties and uncertainties, see pp. 125-26, *supra,* inherent in using attrition and rehiring to reduce LPCs.

173. The figures in Table 34 are derived as follows: 389 is taken from Grotz (S) (Oct. 15, 1980) at Table 2. The figure for year 2, 112, is obtained from Grotz (S) (Oct. 15, 1980) at Table 3, "Summary", lines 1-2: subtracting 2,015 from 2,161 leaves 146 and subtracting 34 unprotected employees, see *id.* at Table 3 n.6, assumed to come from earliest group possible, leaves 112. The same methodology has been applied to obtain the remaining figures in Table 34.

174. Distribution of employees choosing lump sum payments by years of service was obtained by calculating the percentage of employees in each of the WJPA categories, *e.g.*, 4/195 = .0205, see Grotz (S) (Oct. 15, 1980) at Table 8, and .0205 x 112 = 2.

Base period salaries used in Table 39 & 41 derived from Grotz (S) (Oct. 15, 1980) at Table 6, and adjusted to reflect real increase in railroad wages and fact that recipients would earn somewhat less than

average wage. *E.g.*, for 1975 salary, $11,800 x 1.0242 = $12,373; $12,373 x 95% = $11,754. This figure is then adjusted to reflect 4/75 – 4/76 base period: $11,847.

175. The LPC studies prepared by the parties did not attempt to quantify the effect of a later acquisition date on LPCs. Moreover, the record is devoid of evidence that would permit us to attempt such calculations, although we seek to reflect the effect of this factor in the bargaining between the acquirers and the Ts and in our estimate of the number of LV employees adversely affected by acquisition, see note 171, *supra*.

176. In 1968 PC estimated that its LPCs under the PCMPA would total approximately $78 million in the eight years following its merger with the New York Central Railroad. *Pennsylvania R.R.—Merger—New York Central R.R., supra*, 327 I.C.C. at 686. After only five years, however, PC had incurred LPCs of $116.3 million. Ex. GPS-Labor-4.

177. As noted earlier, p. 103, *supra*, the ICC generally has refused to impose labor protection conditions in cases involving complete abandonments. See cases cited in note 130, *supra*. Decisions to the contrary have occurred only infrequently and in unusual circumstances, such as a sale of abandoned lines for considerably more than scrap value, *e.g., Washington & Old Dominion R.R., supra*, 331 I.C.C. at 600-02.

178. Our timing analysis must include abandonments, as well as sales, even though the former may be a nonrail use issue according to the letter of the Second Pre-Trial Order. Similarly, we decide the timing of the PC and R dispositions, despite the penultimate paragraph of the Sixth Pre-Trial Order, since the disposition of all Ts are intertwined. None of the parties challenges this.

179. Under a "two-step" reorganization plan, each bankrupt would first dispose of its properties, with ICC approval, and then submit a plan for distribution of the proceeds, rather than submitting a unified plan in the first instance. See *New Haven Inclusion Cases*, 339 U.S. 392, 413 n.47 (1970). See also Blanchette (D) (June 19, 1979) 289-92, 9 GP Supp. App. at 21-23.

180. R appears to suggest that its disposition might have taken place under § 77(o), rather than §§ 77(d) and (e). Section 77(o) authorizes "interim" sales and abandonments, while §§ 77(d) and (e)

authorize sales and abandonments as part of a "final scheme of reorganization". For present purposes, the distinction between the two is not relevant, since the ICC would have had to scrutinize the sales and abandonments of rail use properties under either.

181. Sections 77(d) and (e) require that a reorganization plan be approved by the reorganization court after it is approved by the ICC. Blanchette testified that court approval of the decision to file with the ICC is also required. Blanchette (S) (Dec. 1, 1979) at 14. See also 2 ELF at 470 n.18. EL submitted, however, that court approval of the filing would be "virtually automatic". *Id.* Relying on this unrebutted assertion, we conclude that such approval, if necessary, would not have delayed the disposition process.

182. The ICC would, in fact, have evaluated the proposals under §§ 77(d) and (e) of the Bankruptcy Act, but these sections incorporated the standards of § 5 of the Interstate Commerce Act. *New Haven Inclusion Cases*, 399 U.S. 392, 425 (1970).

183. Evan Allen, Director of Rail Asset Valuation for USRA since 1978, had previously served as Senior Financial Analyst for the Southern Railway System and as Master Budget Accountant for Lockheed Aircraft Corp. Allen (S) (Nov. 1, 1979) at 1-2. Allen testified that it would have taken potential purchasers of IFLs two years or more to prepare the financial projections necessary to negotiate a memorandum of understanding. *Id.* at 4. William Quinn, a Director of the National Railroad Passenger Corporation (Amtrak), had been Chairman of the Board of the Chicago, Milwaukee & St. Paul Railroad, as well as President of the Chicago, Burlington & Quincy Railroad. Quinn (S) (Nov. 1, 1979) at 1-2. He testified that studies sufficient to support even tentative offers could not have been completed before February 1975. *Id.* at 4. Maynard Parks, a labor expert for the GPs, had worked in labor-related capacities in the railroad industry for over 40 years. He had served as Chairman of the Western Carriers Conference Committee and as Vice-Chairman of the National Railway Labor Council, and had been involved in negotiations with unions concerning several major rail acquisitions. Parks (S) (Nov. 1, 1979) at 1-2. Parks testified that an in-depth labor study relating to one of the IFLs would have taken at least a year. If more than one IFL were studied, more time would have been required. *Id.* at 17.

184. See, *e.g.*, Myles (S) (Nov. 1, 1979) at 14-26; Luna (S) (Nov. 1, 1979). Charles Luna is a Director of Amtrak and has been President

of both the Brotherhood of Railroad Trainmen and the United Transportation Unions. *Id.* at 1. Alfred Myles is a former Assistant Vice-President of Labor Relations for Chicago & Northwestern. Myles (S) (Nov. 1, 1979) at 1.

185. *E.g.*, Stangl (S) (Nov. 1, 1979); Altshuler (S) (Nov. 1, 1979); Schuler (S) (Nov. 1, 1979). Raymond Schuler is a former Commissioner of Transportation for the State of New York. *Id.* at 1. Alan Altshuler is Chairman of the Political Science Department and Professor of Urban Studies and Planning at MIT. Altshuler (S) (Jan. 31, 1979) at 1. Peter Stangl has been an Assistant Professor of Economics at Wheaton College, Assistant Transportation Administrator for New York City, and Assistant Commissioner for Public Transportation in the New Jersey Department of Transportation. Stangl (S) (Nov. 1, 1979) at 1-2.

186. *E.g.*, Brooks (S) (Jan. 31, 1979); Corber (S) (Jan. 31, 1979). Robert Corber served as a member of the ICC from March 7, 1975, to December 1, 1976, and had twenty-four years of private legal practice in the transportation field. *Id.* at 1-3. Robert Brooks was employed by the ICC for twenty-one years, and served as Director of the Commission's Office of Proceedings from 1974 to 1978. Brooks (S) (Jan. 31, 1979) at 1-4.

187. See Blanchette (S) (Dec. 1, 1978) at 10-11, 40-42; Shannon (S) (EL) (Dec. 31, 1978) at 93-94; Israel (S) (Dec. 31, 1978) at 21-22; Hesse (S) (R's Probable Actions) (Dec. 31, 1978) at 21-22. Robert Blanchette, who testified for PC, was, first, a trustee, then Chairman of the Board of Trustees, and finally Chief Executive Officer of PC during the mid-1970's. He had previously been Counsel for the Trustees and, before that, General Counsel to the New York, New Haven & Hartford R.R. Blanchette (S) (Dec. 1, 1978) at 1. Phillip Israel, a witness for LV, had served with the ICC for eighteen years in various capacities. When he left the ICC in 1977, he was Deputy Director, Office of Proceedings, Section of Finance. Israel (S) (Dec. 31, 1978) at 1. Alfred Hesse, Jr., had been associated with R for more than thirty-nine years, primarily in legal and marketing capacities. He became the President of R in 1977. Hesse (S) (R's Probable Actions) (Dec. 31, 1978) at App. 1.

188. The GPs do not contest that these Ts would have become cashless on these dates, assuming the absence of financial assistance, nor do they contest AA's cashlessness date.

189. As R points out, however, one GP witness testified that unaffected shippers would have pressed for speed. 2 RF at 245-246, *citing* Corber (D) (July 8, 1980) at 344, 8 R. App. Ex. 77.

190. Indeed, the GPs themselves assert that the threat of cashlessness is the core of the Ts' argument that labor and public bodies would have accepted unfavorable terms in the alternative scenario. 6 GP at U 2; 1 GPRB at C 1-2.

191. The *CUE Opinion* actually held that in the Rail Act world the government was permitted to "keep the railroads active for such a reasonable time as was necessary to effect a solution". *CUE Opinion*, 439 F.Supp at 1378. Because Congress was the prime actor in the solution, there was certainty that some solution could be found and that the Ts would be compensated for any damages in awaiting it. In the alternative scenario, however, where Congress by hypotheses could not itself take control of the Ts' lines, it is a fair extension of the *CUE Opinion* to allow the government to pursue a course of action that has a "high likelihood" of success within a reasonable time.

192. It might be argued that Congress could have avoided this danger by granting subsidies large enough to prevent erosion of creditors' rights. This argument is implausible, however, in view of the enormity of the cost. More important, such subsidies would create a stalemate, which Congress would eventually have to break. If continued indefinitely, they would have amounted to a purchase of Ts' properties by Congress under an installment plan—a forbidden "second-best Rail Act". *Cf.* RRB at 150 n.1.

193. Of course, postulating that Congress would have limited its financial assistance does not necessarily establish that reorganization courts would not have ordered some Ts shut down. Some courts, for example, might have considered the chance of successful sales too remote. We believe, however, that the sales would have gone through.

194. Aage Clausen is Professor of Political Science at Ohio State University. He is a member of the Council of the Inter-University Consortium of Political and Social Research, and Chairman of its Advisory Committee on Elite Studies. Clausen has published several articles on the policy decisions of members of Congress. Clausen (S) (Nov. 1, 1979) at 1-3.

195. Sections 213 and 215 of the Rail Act itself, 45 U.S.C. §§ 723, 725, provided aid, but it was limited in amount, and in duration as well

(until the date of conveyance). Of the legislation cited by Clausen that actually involved the commitment of federal funds, both the Transportation Act of 1958, Pub. L. No. 86-625, 72 Stat. 568 (amending 49 U.S.C. §§ 1, 13, 13A, 15A, 203, 501-510), see Clausen (S) (Nov. 1, 1979) at 18-19, and the Emergency Rail Facilities Restoration Act ("Hurricane Agnes" Act), Pub. L. No. 92-591, 86 Stat. 1304 (Oct. 27, 1972), see Clausen (S) (Nov. 1, 1979) at 26-27, were one-shot responses to specific needs. The High Speed Ground Transportation Act of 1965, Pub. L. No. 89-220, 79 Stat. 893 (1965), see Clause (S) (Nov. 1, 1979) at 19-21, provide funds for research and development by the Secretary of Commerce, not grants to carriers, and was limited as to both amount, Pub. L. No. 89-220 § 11, and duration, *id.* § 12. Although the Act was thrice extended, these extensions also carried time and expenditure limits. See Pub. L. No. 90-423, 82 Stat. 424, §§ (e), (f) (July 24, 1968); Pub. L. No. 91-444, 86 Stat. 915 (Oct. 13, 1970); Pub. L. No. 92-348 § 3, 86 Stat. 462 (July 13, 1972). The Rail Passenger Service Act of 1970 (Amtrak Act), Pub. L. No. 91-518, 84 Stat. 1327 (Oct. 14, 1970), see Clausen (S) (Nov. 1, 1979) at 21-23, provided guarantees on PC's obligations to stave off cashlessness. The authorized guarantees, however, were limited to $125,000,000. 45 U.S.C. § 662(e). While the Act could, nevertheless, be read to indicate a congressional willingness to pump needed cash into bankrupt railroads indefinitely, see *id.*, this is not the best reading. More likely, the Act was a stopgap, passed hurriedly in the last days of Congress, leaving the next Congress to devise a permanent solution if necessary. See H. R. Rep. No. 1770, 91st Cong, 2d Sess., *reprinted in* [1979] U.S. Code Cong. & Ad. News 5983, 5983; *id.* at 5987-88 (minority view). See also 116 Cong. Rec. S 44066 (Dec. 30, 1970) (remarks of Sen. Cotton); *id.* at H 43334 (Dec. 22, 1970) (remarks of Rep. Randall). In addition, Congress may have thought that a permanent legislative solution would never be necessary, that the railroads could be successfully reorganized after a single infusion of federal funds. See *id.* at S 44065 (Dec. 30, 1970) (remarks of Sen. Hartke).

196. See Northeast Rail Transportation: Hearings on H.R. 6591, H.R. 4897, H.R. 5822, H.R. 5385, H.R. 6880, H.R. 7373, & H.J. Res. 50 before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 231, 238 (1973) (remarks of Secretary Brinegar); *id.* at 251 (Statement of Jervis Langdon)

197. The GPs argue that consideration of such legislation in the alternative scenario is legally impermissible. 6 GP at T 219-222. They contend, first, that the Ts may not rely on changes in the law that were unforeseeable in February 1973. Second, they contend that the Ts may not add value to their property by claiming benefits that would have accrued from courses of action the government rejected or never considered, since the government did in fact enact a specific package of benefits, the Rail Act itself. Finally the GPs argue that the Ts may not assert that any of the procedural benefits of the Rail Act would also have been present in the alternative scenario. As to the first argument, it has been clear all along that interim aid was foreseeable. Congress would not have sat idly by while the Ts shut down. *CMV Opinion*, 445 F.Supp. at 1009. And it is inconsistent to claim, as the GPs appear to, that interim aid was foreseeable, but that congressional action to limit it was not. The other arguments are adequately addressed by noting that in the *CMV Opinion, id.*, we specifically permitted regulatory reforms to be taken into account. The only congressional actions that we removed from consideration there were the purchase of the Ts' lines or the equivalent underwriting of their continued operation into the indefinite future.

198. It should be noted that the Bankruptcy Code and Milwaukee Act are also of general applicability, see Milwaukee Railroad Restructuring Act, § 17, 45 U.S.C. § 1015, and thus could apply to larger transactions.

199. The Chessie Study itself took only three months to complete. White (D) (July 18, 1977) at 69, EL App. K at 240.

200. EL offers comparisons to several mergers that are not in fact comparable. See 2 ELF at 468-77. R states that the evidence shows public bodies could act quickly when necessary, and cites testimony of witnesses Hesse and Ronan. 2 RF at 224. But the evidence they cite does not bear them out.

201. One GP witness, Clausen, analyzed several statutes and concluded that federal aid would have been in the form of loans. Clausen (S) (Nov. 1, 1979) at 33. But the precedents cited are equivocal. In any case, the closest analogy is the Rail Act itself.

202. As to traffic protection, the GPs offer no evidence showing what conditions would have been imposed or what effect such conditions would have had on the earnings values of the T's lines.

203. For similar reasons, we also find it implausible that the ICC would have conditioned its approval on any solvent's acquisition of predominantly passenger lines, leaving it to the public bodies to operate the passenger service on those lines, see pp. 232-33, *infra*. Substantial doubt about the ICC's willingness, or even its power, to impose such a condition would have induced the public bodies to negotiate in earnest for the purchase of the passenger lines and operations long before the ICC reached its decision. Having thus "tipped its hand", a public body would have been unable to persuade the ICC to require solvent acquirers to buy losing passenger lines.

204. LV argues that the ICC had for many years denied that it had power to restructure the Northeastern rail system. LV at 27. This is irrelevant, since the witness on whom LV relies admitted on cross-examination that the ICC's denial applied only to proceedings it initiated. Israel (D) (May 14, 1979) at 88-89, 25 GP Supp. App. at 591-92.

205. We do not, of course, hold that any of this opposition would necessarily have been successful. Much of it most likely would not. For present purposes it is enough that all the Ts' dispositions would have encountered opposition, which would have slowed the process.

206. LV presented the testimony of Phillip Israel, Deputy Director of the division of the ICC that would have handled LV's petition. Israel (S) (Dec. 31, 1978) at 1-2. Israel stated that the ICC would have recommended against consolidating LV's application with the disposition of PC, in part because such a consolidation would be beyond the Commission's power. As Israel himself admitted, however, this reasoning was flawed. See note 204, *supra*. Moreover, as the GPs correctly point out, Israel's expert testimony is no more credible than the contrary view taken by GP witness Brooks. See 2 GPRB at U 21-22.

207. Shannon cited, as important examples of necessary "tag ends", completion of financing and "formalization" of sales contracts. Shannon (D) (May 24, 1979) at 575, EL App. K at 187.

208. Shannon (D) (May 24, 1979) at 575, EL App. K at 187.

209. See 2 ELF at 470.

210. LV did not conduct any passenger operations. It does not contend that its Aldene to Hunter segment, over which CNJ operated

passenger service, would have been treated by a public body as a passenger line. Rather, it was included with lines to be acquired by the JT owner, or, in the absence of the JTs, included with LV's freight lines in proffers for private acquisition. Response of the Erie Lackawanna and Lehigh Valley Trustees to the Court's Letter Dated September 24, 1981 Concerning "Predominantly Passenger" Lines in the North Jersey Terminal Area (Oct. 7, 1981) at 4, Sp. Ct. Rep. at N 37257.

211. This figure does not include the value of those portions of CNJ which the JTTs designated as part of the NJ/NYTerm. CNJ claims $100 million for its entire system.

212. An unspecified amount would have to be added to this figure for CNJ's main line, which the JTTs designated as predominantly passenger. PC also alleged an acquisition price of some $667 million for the rest of its Northeast Corridor properties from Massachusetts to Maryland, portions of which the JTTs also assumed would have been acquired by public bodies.

213. This figure in part represents the GPs' estimate of the excess of terminal costs over the terminal revenues that would have been collected from switching charges as set by the JTTs, as well as increased costs accruing from public body acquisition of the predominantly passenger lines and the Northeast Corridor Spine.

214. Many of these arguments apply to AA and CNJ as well.

215. See p. 233, *infra*.

216. As precedent for the JTs, the JTTs point to publicly owned terminal railroads in New Orleans, Galveston, Savannah, and Mobile. These, however, have an average length of only 48 miles of main line. By contrast, Philaterm would have comprised 114.2 route miles and the NJ/NYTerm 241.5. Compiled from Storm (S) (JT) (Dec. 15, 1978) App. C. These figures exclude an even greater amount of predominantly passenger lines that would also have been used for terminal operations.

217. In addition to the publicly owned terminal railroads mentioned in note 216, *supra*, the JTTs find precedent for public involvement in the rail freight business in the 1976 acquisition by the Massachusetts Bay Transportation Authority (MBTA) of certain lines of the Boston and Maine Railroad (B&M), and in the freight operations on the Long Island Railroad (LIRR) conducted by the Metropolitan Transit

Authority (MTA). See JTRB at 64. MBTA purchased 270 miles of the B&M's lines in and around Boston and entered into an operating agreement with B&M for the purpose of improving commuter service. See 2 CRA (S) (Dec. 1, 1978) at VI. While most of the trackage acquired consisted of commuter lines used jointly for freight traffic, a few lines which had been used exclusively for freight were also included. *Id.* at VI 58-65. B&M obtained trackage rights over all the transferred lines, with obligations to share maintenance costs on the jointly used segments and pay the full costs of maintenance on those used exclusively for freight. The acquisition of the freight-only lines apparently was made with the intention of expanding commuter service to them, a right which MBTA secured in the agreement. Although a GPs witness testified that a subsidiary goal of MBTA in effecting the transaction was to remove obstacles to B&M's attempt to reorganize as a freight carrier, see JTRB at 64, nothing about the transaction remotely suggests that MBTA was prepared to undertake freight operations on its own or even to subsidize B&M's freight operations.

The MTA's purchase of the LIRR was clearly for the purpose of maintaining passenger service, and its decision to continue freight operations hardly counts as evidence of the strong public commitment to upgrading freight service alleged by the JTTs.

218. This conclusion assumes that the main freight lines would have been sold for continued rail use. If it should turn out that the Ts would have dismantled their freight lines and sold them for scrap, our entire discussion of the acquisition of the JTs properties would become irrelevant.

219. LV's only segment carrying passenger traffic was not proffered for acquisition as a passenger line, see note 210, *supra*.

220. The GPs again question the permissibility of considering public bodies other than the federal government as potential purchasers. Although we indicated disagreement with their position in the *CMV Opinion*, 445 F.Supp. at 1037-40, we reserved final decision "to await factual development which will enlighten us as to the true dimensions of the issue". *id.* at 1040-41. Further consideration of the issue has reinforced our original inclination. It should be noted that public bodies' eminent domain powers do not diminish but rather enhance their bargaining position relative to the Ts, see pp. 235-36, *infra*. Moreover, there are built-in limits to any potential burden upon the federal government's condemnation powers. Consideration of public body purchases

is contingent upon a showing that acquisition would have been likely in the absence of the federal government's taking, and the amount of an award is limited to the amount the Ts can demonstrate that public bodies actually would have been willing to pay. In this sense, an award based upon a state's or municipal corporation's willingness to pay is no different from one based upon a private corporation's willingness to pay. Finally, there is nothing unusual about state law influencing the amount paid by the federal government in a condemnation proceeding since state law largely defines property rights. State regulations such as zoning ordinances diminish the value of some parcels of land and increase the value of others. In fact, the burden imposed by such public body action is less limited than that made possible by consideration of public body acquisition since the latter must be backed by the public's willingness to pay whereas the former is not. *Cf.* pp. 271-72, *infra.*

221. The GPs argue in the alternative that if consideration of changes in state law necessary for acquisition is to be permitted, then changes enhancing the power of public bodies in ways that might improve their bargaining position, for example, by authorizing quick-take condemnation, similarly should be considered. With this we agree as well, as intimated in our *CMV Opinion*, 445 F.Supp. at 1041.

222. The GPs' citation of T witnesses indicating that the absence of the Rail Act was itself unforeseeable as support for the proposition that requisite changes in state law were thus not reasonably foreseeable, 4 GP at Q 23-26, requires no extended discussion. The very premise of the alternative scenario, as in any condemnation proceeding, is that value is to be determined under the hypothetical assumption that the taking had never occurred. See pp. 32-33, *supra.*

223. For example, while EL's contract with New Jersey provided for a return on the net salvage value of facilities that would no longer be needed if passenger operations ceased to exist, it provided no return on facilities required for freight traffic even though used jointly by the passenger service.

224. This extended history of financial support culminated in 1978 with the State's purchase from Conrail of a substantial portion of EL's commuter lines under the Rail Act's 900-day option. The price, however, was much less than the $114.4 million EL seeks here. New Jersey paid only $8.8 million for the 125 miles of EL passenger lines it acquired in 1978. Compiled from Ex. PCT-NJ-100 at 02695, ELP App. 34.

225. 4 GP at P 86. *Cf. id.* at 70-71 (New York).

226. *Id.* at 79-80; see *id.* at 4-5; *id.* at 66 (section of argument described as reinforcing pricing conclusions). The GPs' reply brief provides a presumably exhaustive list of alleged impacts of their evidence concerning states' financial abilities, 2 GPRB at K 18-19. Frugal pricing policy receives first mention, followed by the claim that public bodies would first have pursued all alternatives to acquisition, discussed, *supra,* at pp. 207-11, contentions as to switching charges, *cf.* pp. 244-51, *infra* (trackage rights fees), and timing, see pp. 169-96, *supra,* neither directly relevant to this question, and the idea that public bodies would set priorities, buying only lines with high cost-benefit ratios, see also 6 GP at Y 9-21.

227. It is necessary that we include in this figure all public body lines, including those of Ts no longer in the case, unless it could be assumed that New Jersey would have purchased El's lines in preference to any of the others if funds proved inadequate. Since we find the State's capacity sufficient to purchase all the predominantly passenger lines, we need not decide precisely what the State's priorities among the lines would have been.

228. Even if current subsidies fully reimbursed shortfalls in avoidable costs, the Ts contend that public bodies would have assumed responsibility for the overhead costs on the predominantly passenger lines. The extent of the increased financial burden depends upon the trackage rights fees charged to freight traffic. See pp. 244-51, *infra.*

229. We do not mean to suggest that the GPs' estimates of incremental operating costs were accurate. EL hotly contest these figures, arguing that the operating cost shortfall in 1973 according to the GPs' own data was only $10.6 million, ELRB at 272-73, and that state acquisition would have enabled reductions in cost, ELP at 21-22, 26-27, discussed at p. 210, *supra.* In addition, the GPs appear to be implicitly double-counting since their estimates of operating costs include amortization of acquisition costs that the GPs present as a separate component of the financial burden. See ELRB at 273. Once again, because we find that the State could have paid even the higher figure, it is unnecessary to resolve the details of this controversy.

230. First Boston's table, First Boston (S) (Jan. 30, 1980) at 42, unlike the modified version reproduced by the GPs in a later section of

their brief, 6 GP at U 22, gives the impression that substantial increases in all three taxes are necessary to finance the operating burden.

231. In addition, First Boston's indication that the operating costs would consume 11.1 percent of the controllable budget, First Boston (S) (Jan. 30, 1980) at 43, translates, into approximately 4 percent of the total budget, again including the full $114 million of supposed added costs.

232. EL cites a 2.3 percent margin, ELP at 47 n.41, which, after incorporating the GPs' correction, 2 GPRB at K 33 n.57, yields a margin just under 3 percent.

233. The other two bond issues were not targeted to rail preservation and thus are a less useful guide to the most likely result in the absence of the Rail Act. EL's arguments noted in text apply to these proposals with even greater force.

234. EL's suggestion that cancellation of debt owed to New Jersey by the Ts would be an additional funding source, ELP at 58-59, is without merit. The GPs correctly note that to the extent the State ultimately expected to collect those funds, this source would be the equivalent of financing through general revenues, and to the extent it did not expect ever to collect those monies, cancellation of the obligation would hardly have provided any financial remuneration to the Ts. See Netzer (S) (Nov. 1, 1979) at 32-33; 2 GPRB at K 38-39.

235. The GPs' reference in this context to the "ultimately unsuccessful attempt to repeal the 1962 [Port Authority] bond covenant", *id.* at 31, is misplaced since the hypothetical sources of the toll revenues would have been in New Jersey, not under the jurisdiction of the Port Authority. The record does not disclose any similar limitations on the use of New Jersey toll revenues to finance the purchase of passenger lines.

236. See p. 174, *supra*.

237. *CUE Opinion*, 439 F.Supp. at 1377-78.

238. Of this amount, $4.2 million represented the training expenses for the approximately 1,000 employees engaged in the passenger service and the remaining $700,000 was accounted for by the costs of such items as the development of maintenance and safety procedures, work rules, and scheduling, pricing, and ticketing procedures. Shannon (S) (EL) (Dec. 31, 1978) at 92.

239. If, however, in the nonrail use phase, X should turnout to be so low as to not square with "notions of what constitutes 'just compensation' ", *CMV Opinion*, 445 F.Supp. at 1030, we would reconsider the question of whether a New Jersey court would have awarded a premium over X.

240. EL's evidence to the contrary, ELP at 62, 68-69, is far less persuasive. It is no surprise that the officials of the Port Authority whose testimony they rely on would be more fearful of the effect of the *PATH* decision than our analysis suggests. Stangl's testimony is a more reliable indication of perceptions of officials from New Jersey since he was an Assistant Commissioner of the New Jersey Department of Transportation and Secretary of New Jersey's Commuter Operating Agency. In addition, it is not clear that EL's evidence supports the award of a premium. For example, the memorandum prepared by a Port Authority official cited in ELP at 69 refers to "some significant compensation", which seems to draw on the *PATH* court's unwillingness to base an award on a nominal scrap value. And the recommendation of another Port Authority official that the State purchase at a liquidation sale in lieu of condemnation, see ELP at 62 n.57, hardly proves that the sale price would include a premium.

241. "Common basis" refers to appraisal values as determined by CRA. See 9 GP at APP. X 12, 123-31.

242. Although we could not decide that X and common basis are indeed the same until the nonrail use phase of the case, we need not defer decision as to the reliability of the CRA Study since we find that the Ts have not proved that consideration exceeded common basis.

243. In four transactions, in which no common basis could be arrived at, comparison was impossible; in one, common basis exceeded consideration; in another, the common basis figure included so great a range that CRA could not determine whether it was exceeded by consideration.

244. For example, in CRA's PATH case study, it failed to discover a valuation study, see J. Boyd (D) (July 31, 1979) at 24-26, 9 GP Supp. App. at 243-45, and did not review court testimony by one of the negotiators indicating the value of the properties, Dalton (D) (July 3, 1979) at 25-26 (PATH), 9 GP Supp. App. at 546-47; Ex. GPS-historical Transactions—118 at 28-30. Appraisals of properties involved in other transactions also went undiscovered, Wise (D) (June 8, 1979) at

126-27 (Cleveland), 21 GP Supp. App. at 716-17; Nelson (D) (June 28, 1979) at 67-68 (WMATA), 15 GP Supp. App. at 252-53. In yet another instance, CRA never obtained the purchase and sale agreement, presumably the most important document of all, Dalton (D) (June 11, 1981) at 101 (Skokie), 9 GP Supp. App. at 549.

245. For example, they interviewed only one of seven participants in the Long Island transaction, 2 CRA (S) (Dec. 1, 1978) at I 16 (listing participants); Lincoln (D) (June 11, 1979) at 89-94 (LIRR), 13 GP Supp. App. at 598-603, neither of the two most important in the B&M transaction, Burrows (D) (June 12, 1979) at 77-78, 9 GP Supp. App. at 427-28, and none of seven in the PATH acquisition, Dalton (D) (July 3, 1979) at 15-16 (PATH), 9 GP Supp. App. at 550. In one case, CRA did not interview the person it had been told was "the person to talk with," Burrows (D) (July 3, 1979) Ex. 30 (East End), 9 GP Supp. App. at 463; see CRA (S) (Dec. 31, 1978) at 94-108 (list of persons interviewed, which does not include Fred Morgan, the person identified), with the result that CRA apparently overstated noncash consideration by over 200 percent. *Compare* 2 CRA (S) (Dec. 1, 1978) at V 45-46 (quantifying operating subsidies at $175,000 for January to July 1973 as part of consideration) *with* F. Morgan (S) (Nov. 1, 1979) at 9-10 (indicating minimal increase in operating subsidy).

246. See, *e.g.*, D. Smith (D) (May 8, 1980) at 62-66, 9 GP at App. X33-34 (CRA researcher interviewed Donal Smith; at deposition Smith expressed shock at the method of inquiry and that his statements were used in litigation.)

247. In one case, CRA reported the view of the chief Penn Central negotiator, Burrows (D) (July 3, 1979) at 264-66 (East End), 9 GP Supp. App. at 449-51, ignoring those of two MBTA officials they had interviewed, see Burrows (D) (July 3, 1979) Ex. 29, 30 (East End), 9 GP Supp. App. at 461-63.

248. See, *e.g.*, J. Boyd (D) (July 31, 1979) at 31, 9 GP Supp. App. at 249 (Boyd insisting that a lease was not a lease).

249. This was the source of 60 percent of the $521.8 million consideration in the five transactions considered in Ronan's testimony.

250. For the acquisition of the Harlem-Hudson lines, CRA used $22.6 million, 2 CRA (S) (Dec. 1, 1978) at IV 42, whereas PC trustees had told the bankruptcy court that the amount was only $13.5 million, J. Boyd (D) (June 20, 1979) Ex. 2 at 8 (Harlem-Hudson), 9 GP Supp.

App. at 374. If PC's figures are correct, consideration was overstated by $91 million.

251. See 2 CRA (S) (Dec. 1, 1978) at III 32-38 (SIRT). No CRA evidence indicated that these past payments were in any way perceived by the parties to the transaction as consideration. See Nathan (S) (Nov. 1, 1979) at 26-27.

252. In the East End transaction, CRA included subsidy payments that were totally unrelated to the sale of the properties. F. Morgan (S) (Nov. 1, 1979) at 2-4.

253. See, *e.g.*, Prince (S) (Historical Transactions) (Nov. 1, 1979) at 6, 12 (within two years, passenger service would otherwise have ceased on the West End and Harlem-Hudson lines); Dalton (D) (July 31, 1979) Ex. 2 at 505 (Skokie) (ICC had expressed doubt that service would continue in the absence of the acquisition), 9 GP Supp. App. at 568.

254. See 9 GP at App. X 54-55. We have not been able to locate any evidence offered in defense of either the change or the ten times multiplier itself. Given the formula used to derive a multiplier, see CRA (S) (Dec. 1, 1978) at 50-51, it would seem that unlike the 4.31 factor, the ten times factor was not derived from a particular assumption concerning the number of years that deficits would continue, since such a calculation would not yield a round number. Rather, one might infer that the multiplier was chosen first, and then estimates of the underlying factual assumption concerning the number of years of future deficits were approximated by working backwards.

255. For some Staten Island Rapid Transit properties, a document indicated a value of $7.8 million as compared with a cash payment of $3.5 million agreed upon by the parties. See Caust-Ellenbagen (D) (July 3, 1979) Ex. 2, 9 GP Supp. App. at 493. See also pp. 225-26, *infra*, (ignored B&M appraisal); note 256, *infra*, (questionable LIRR appraisal).

256. An appraisal that was available to and relied upon by at least one of the parties valued the acquired properties at almost $87 million. 2 CRA (S) (Dec. 1, 1978) at I 22-29. The common basis actually used by CRA cut over $35 million from the land valuation, Seymour (S) (Dec. 1, 1978) at 3-6, 113, for reasons that are not altogether clear and for which support does not appear in the record. Most importantly,

there is no indication that any such adjustment was contemplated by either party to the transaction.

257. Ronan also ignored the dependence of earnings values on the Ts' main freight lines upon the passenger lines remaining in rail use, Ronan (D) (July 10, 1979) at 533, 17 GP Supp. App. at 591; Netzer (S) (Nov. 1, 1979) at 15-16. See pp. 231-33, *infra*.

258. D would be fully lost only if competitive bidding drove the sales price close to capitalized earnings value. It would thus be more accurate to say that the deduction should only be so much of D as would affect the purchase price. However, since we conclude that there would have been competitive bidding for EL-LV by Chessie and more than one Western bidder, see pp. 253-59, *infra*, we shall speak simply of a deduction of D.

259. Altshuler (S) (Nov. 1, 1979) at 7-10, 25 (Secretary of Transportation for Massachusetts, 1971-75); Whitehurst (S) (Nov. 1, 1979) at 29-30 (past consultant to various state and interstate transportation authorities; participated in developing and negotiating passenger subsidies for New Jersey); Netzer (S) (Jan. 31, 1979) at 46 (advisor to numerous public agencies); Stangl (S) (Nov. 1, 1979) at 19-20 (Asst. Commissioner for Public Transportation in New Jersey, 1974-78); Tennyson (S) (Nov. 1, 1979) at 6 (Deputy Transportation Secretary, Pennsylvania, 1972-1979); Comments and Recommendations of the State of New York on "Rail Service in the Midwest and Northeast Region", Rossi (S) (Dec. 31, 1978) Ex. 1 at 24-25 (New York's study of branch line contributions to profits as support for inclusion of all the State's branch lines in the FSP); Review of United States Railway Association Preliminary System Plan (Pennsylvania Department of Transportation), Ex. GPS-Public Bodies-142 at 15-16 (arguing that branch lines not contributing sufficient profits to Conrail might contribute sufficient profits to other railroads to justify their continued existence). The GPs' argument that public officials would have had reason to fear charges of bailing out the Ts through using public funds to boost the Ts' profits on the rest of their systems is also persuasive. See Altshuler, (S) (Nov. 1, 1979) at 15.

260. We here use the phrase "a passenger line" without determining whether EL's passenger lines are to be viewed separately or as a package—an issue discussed at pp. 238-39, *infra*.

261. Waldner (S) (Jan. 30, 1980) at 3-4 defines "exclusively" as "traffic originating or terminating at stations exclusively served by the public body lines". Traffic merely passing over public body lines or served by other lines must be excluded, see *id.* at 11 (indicating that the figure for all public body traffic would be 54 percent of revenues), since it could in principle be rerouted if the public body lines were abandoned. This evidence was not excluded by the order and stipulation discussed at note 14, *supra*.

262. El's response proves the point:

> The major failing of the above Government Party argument is that it implicitly assumes that a prospective solvent acquirer of the Transferors' main freight lines would have been willing to proceed with such an acquisition without prior assurances from the State that the State would acquire the Transferors' unprofitable passenger business. The fact is that no profitable carrier would have been willing to acquire the Transferors' main freight lines without such prior assurances from the State, and the State would have provided such assurances in order to induce a private acquisition of the critically important main freight lines.

ELP at 66 (citations omitted). In fact, the GPs' argument not only recognizes the interdependence of the transactions, but relies upon it to demonstrate that the Ts would have had no choice but to accept any offer in excess of X minus D.

263. See Netzer (S) (Nov. 1, 1979) at 8-9; Tennyson (D) (Mar. 19, 1980) at 156-59, 20 GP Supp. App. at 757-60; Altshuler (S) (Nov. 1, 1979) at 21-22; Jacobs (S) (Nature and Consequences) at 36-39; Prince (D) (Apr. 25, 1980) at 221-22, 16 GP Supp. App. at 765-66.

264. "Public bodies in the alternative scenario would have recognized [the Ts' aversion to following through on threats of a shutdown] and would have behaved accordingly." Altshuler (S) (Nov. 1, 1979) at 22. See also Ex. GPS-Public Bodies-186 at 8 (statement of R trustees upon review of SEPTA agreement) ("What the bondholders wish this Appellate Court to do is to require that an order be entered against the Trustees forcing them to play Russian Roulette with the public interest, with very poor odds."). Although Schelling noted that a T would have had "virtually nothing at risk in adopting any tactic that, should it fail, condemns [it] to recovering the nonrail use value of [its]

properties", Schelling (S) (Oct. 15, 1980) at 27, this comment is inapplicable to passenger lines for which D is significant since shutdown would risk loss of earnings values on the main freight lines.

265. Of course, when a T came back to the bargaining table to negotiate over what, if anything, of value was left of its system, it might be in a better position, but the cost it would have to suffer would have been too great, and, by comparison with the public body, the benefit would have been too small. Thus the factual predicate of what Schelling implicitly indicated to be a necessary condition for an effective threat is lacking. Schelling (S) (Oct. 15, 1980) at 24-25.

266. The Ts' bargaining power is further reduced by their relative inability to withstand delay, see Jacobs (S) (Nov. 1, 1979) at 20, which is due to both the dependence of the sales of their main freight lines upon disposition of the passenger lines and the interim operating losses they would suffer.

267. The GPs note that public officials would have been inclined to condemn in any event in order to shift responsibility for paying the Ts high prices to the courts. See, *e.g.*, Altshuler (D) (June 6, 1980) at 362, 8 GP Supp. App. at 662; Netzer (S) (Nov. 1, 1979) at 37 ("Payments by a public body of a premium because of [the] possibility [of a premium being awarded by a condemnation court] would subject public officials to great public criticism."). But it seems likely that a state would have paid a negotiated price if it would have been sufficiently low. Since the Ts do not contend that a state would have condemned passenger lines in lieu of paying a price based upon the GPs' pricing theories—and no historical evidence in the record indicates that such a result would have been likely—we assume that a state would have attempted to negotiate an acquisition at such prices.

268. The doctrine of setting off the value of special benefits conferred on the remaining parcel by the taking is followed in New Jersey. See 3 Nichols, *supra*, at § 8.6211[31].

269. The argument that no improvements were contemplated—just continuation of the same use to which the lines always had been put—RRB at 37-39, is without merit. The contention turns upon a formalistic interpretation of "improvement" that excludes from its meaning a state's rescuing the Ts' lines. "Improvement" is a relative term that in the takings context is addressed to the question of what would have happened but for the taking. It should be noted that any

interpretation to the contrary would have the necessary result not only of foreclosure set-offs for special benefits but also of foreclosing an award for damages to any remaining property in such situations. This much is implicitly conceded by R's citation of 3 Nichols, *supra*, at § 8.6201, RRB at 38, since the italicized portion in R's excerpt is immediately followed by a phrase indicating that special benefits "are ascertained according to the same principles as damages". Finally, if a formalistic approach were to be taken, it is not clear that the factual requisite to this attempt at distinction is present since a state would only have reason to perform the act of condemnation after a T's provision for abandonment were complete, at which point the use immediately prior to the taking would not be rail use.

270. The GPs' methodology is described in GPs' Sept. 14, 1981, Response at 17-21, Sp. Ct. Rep. at N 36872-76. Briefly, the GPs added revenues attributable to the Boonton and Suffern lines alone, multiplied the total by the excess of revenue over variable cost using a range of variable cost ratios, and capitalized the resulting annual figure using the methodology EL had used in its case. For the EL-LV Western acquisition, the figures range from $71 million to $213 million; for the EL-LV Chessie acquisition, from $83 million to $190 million, GPs' Sept. 14, 1981 Response at Table E, Sp. Ct. Rep. at N 36887.

271. In the context of the GPs' deduction argument, we find no merit in EL's excuse that the record is silent "[b]ecause of the Government Parties' 'all or nothing' approach", EL's Oct. 7, 1981. Response at 5, Sp. Ct. Rep. at N 37258. EL has conceded that the passenger lines contribute to the earnings value of the freight lines, and had ample opportunity to present evidence on the feasibility of rerouting in response to the GPs' claims.

272. It may not appear to go far enough since abandonment of the Boonton line would entail a substantial change in EL's and LV's overall operations in the North Jersey region and thus eliminate some fixed costs. For example, Jennison averaged full cost and variable expenses in estimating the impact of a 50 percent increase in traffic, which historically had moved over LV's system, on EL's line between River Junction and Buffalo. Jennison (S) (EL) (Dec. 31, 1978) at 19. But the revenue measure for the Boonton line refers to the revenue generated over the entire EL-LV system. This figure is large because a substantial portion of that traffic involves long hauls. Thus, in the event of abandonment, fixed costs along with variable costs would be eliminated over

the Boonton line itself, but fixed costs over the rest of EL's system would not be substantially affected. Thus the compromise ratio of 71.4 percent appears more reasonable, especially in light of EL's concession that the Boonton line was essential for any sale of its freight lines to a solvent railroad.

273. Purporting to be applying the statement in the FSP that:

> [w]here freight and passenger operations both use a facility, the dominant user should own the facility and bear all the costs of that facility except those which could be avoided if the minority user were not present.

I FSP at 40, which the Rail Service Planning Office approved, 43 F.R. 37693, 37696 (1978), pursuant to authority conferred in § 205(d)(5)(A) of the Railroad Revitalization and Regulatory Reform Act of 1976, 90 Stat. 59, 45 U.S.C. § 715(d)(5)(A), Shannon arrived at an annual figure of just over $700,000 as the appropriate trackage rights fee for EL movements over the passenger lines. The GPs ridicule this figure as being far too low, indicating, for example, that, under it, passenger service pays 7.9 times the amount charged to freight service on a car mile basis. GPs' Sept. 14, 1981, Response at 23-26 & n.21, Sp. Ct. Rep. at N 36878-81. The reason Shannon arrived at such a low figure was that his formula bore only the vaguest resemblance to that suggested by USRA. On lines where passenger traffic was dominant (over 50 percent on a car mile basis), he assigned *none* of the costs to freight. And on lines where freight was dominant, he assigned only 50 percent of the costs to freight, and even that was not 50 percent of the total cost, but 50 percent of the costs allocated to freight under the ICC's gross ton mile formula. Shannon (D) (June 21, 1979) Ex. 1 at workpapers ELR 300 206134-35. Thus, on predominantly passenger lines, some of which have over 85 percent freight traffic on a car mile basis, he assigned less than 30 percent of the maintenance costs to the acquirer of the freight lines. Shannon conceded that his estimate was equivalent to an avoidable cost freight charge, Shannon (D) (May 22, 1979) at 253, EL App. N at 82; see EL's Oct. 7, 1981 Response at 11-12, Sp. Ct. Rep. at N 37243-44, an allocation formula opposite to that suggested by the GPs' public body witnesses.

274. Technically, the analysis in text both here and later in the section when we address the ability of public bodies to extract additional earnings values through trackage rights fees, see p. 248, *infra*, is inaccurate in that the effect of taxes is not directly considered. Neither the

GPs nor the Ts raised this issue, and we need not consider it at length since it does not change any of our conclusions. The effect of taxes is to reduce the amount by which trackage rights fees diminish earnings values, which are after-tax figures, but to increase the ability of the state to extract additional earnings values by precisely the same amount. To avoid additional complexity in our discussion, we thus do not account for taxes at each step in our analysis.

275. The GPs' argument in no way indicates any threat to the sale of the freight lines unless trackage rights fees set to recoup D would drive the price solvent acquirers would have been willing to pay below the X for those lines. But this qualification is simply the mirror image to the above-noted reservation that deductions from the sale price of the passenger lines could not be so high as to drive the total acquisition price below X for the entire system. This discussion makes the assumption—consistent with the contentions of both parties and the dependence of sales of the freight lines resolution of the disposition of the passenger lines—that there effectively would have been three-party negotiations in each instance among the public body, the T, and the solvent acquirer, at which purchase prices and trackage rights fees would be determined. See *e.g.*, Hesse (S) (JT) (Dec. 15, 1978) at 30; Tennyson (S) (Nov. 1, 1979) at 6-7.

276. It is arguably more plausible that the trackage rights fee method of recovering D would have been chosen since otherwise solvent acquirers of the main freight lines, having already paid the Ts for the full earnings values, would be subject to additional extractions from the public in the future. By paying less for the main freight lines with the expectation that the state would charge trackage rights fees that would recover D, the solvent acquirers of the Ts' freight lines guarantee that they never will be subject to double payment. The GPs in oral argument note the seeming inconsistency between the Ts' insistence that no solvent acquirer of the freight lines would have considered acquiring even fully subsidized passenger operations on the ground that the public could not be trusted to continue the subsidies at the necessary levels in the future and the T's implicit assertion that the public could be trusted to keep the level of trackage rights charges at low initial levels. Tr. at 320-21. But there is a difference between a subsidy that requires renewed appropriations and thus appears on the debit side of a state's budget and a trackage rights fee based upon a predetermined formula for services rendered. In any event, the GPs have offered no basis for quantifying such a further deduction.

277. EL's $2,788,000 figure can profitably be compared to 56.2 percent of the unadjusted maintenance of way total of $4,775,000—$2,683,550. It is not surprising that the two figures are of similar magnitude since the former did represent a measure of freight's share of maintenance costs.

278. EL's assertion that such costs are already included in the trackage rights charge incorporated into their pro formas, EL's Oct. 7, 1981, Response at 16, Sp. Ct. Rep. at N 37248, is irrelevant since we are recomputing that charge and simply wrong since Shannon's $733,000 figure does not purport to include anything besides maintenance of way costs. See Shannon (D) (May 21, 1979) Ex. 1 at ELR 300 206134, 18 GP Supp. App. at 745. EL concedes as much in explaining the derivation of Shannon's figure earlier in its own statement. EL's Oct. 7, 1981, Response at 10-12, Sp. Ct. Rep. at N 37263-65.

279. The GPs object to our consideration of these proffers on the ground that LV's estimate of its own salvage value was so large that EL would never have accepted the balance of the total as adequate. We think it unlikely that if a sale of the combination would have produced the best result for both EL and LV, they would have foregone this sale because of inability to agree on a fair division of the proceeds. At oral argument counsel stated the two roads would have divided the proceeds on the basis of the relative net salvage values of the properties. Tr. at 67, 107.

280. EL includes, properly we think, Union Pacific as a potential bidder. Although in 1973 that road's eastern terminals were Omaha and Kansas City, it reached Chicago via a friendly connection with Chicago & Northwestern. Shannon (S) (EL) (Dec. 31, 1978) at 21.

281. In both instances, Chessie's disadvantage could have been alleviated by acquisition of R's class (a) lines.

282. Darling's attention had been attracted when he noted that EL had an unusually large car hire deficit, a situation which could be corrected by a road, such as Santa Fe, having adequate capital. This led him to go further. Darling (D) (Jan. 31, 1980) at 16-19, EL App. A at 93-96.

283. Barriger, as a GP witness, testified that Santa Fe had concluded not to pursue the acquisition for fear of possible retaliation. However, he conceded on cross-examination that this conclusion did not

describe what Santa Fe's attitude would have been in the absence of the Rail Act. Barriger (D) (Jan. 31, 1980) at 6, EL App. A at 105.

284. Noting this, Shannon proposed that the EL earnings predicted in the study should be adjusted upward in various respects. One was that the Chessie study used 1976 cost levels but did not take into account rate increases beyond October 11, 1975. A conservative assumption that a 5 percent increase would be in effect for the last three quarters of 1976 would increase annual pre-tax income by nearly $10 million. Shannon further adjusted for what he considered to be Chessie's overestimate of normalized maintenance of $10 million. Shannon also pointed out a mathematical error in the analysis of joint facility contracts which would have increased pre-tax net income by $4.2 million. The last adjustment is apparently non-controversial and the others were not controverted. As EL points out in its reply brief, ELRB at 20 n.12, the net result of these three adjustments is an increase of Chessie's figure for pre-tax income before fixed charge from $30.7 million to $54.8 million—as compared with Shannon's own figure of $53.7 million for the fifth year. Shannon believed that additional adjustments for deficiencies in the rerouting analysis and underestimates of traffic increases should have been made, but these were not quantified.

The GPs seeks to discredit the importance of the Chessie study by suggesting, 1 GPRB at F 13-14, that at a 20 percent discount rate, one of the alternatives posed in the Chessie study, the capitalized earnings of EL would have been only $34.5 million as against $52,936,444 proposed in the March 1, 1976, Green Book. However, the GPs have never proposed a discount rate as high as 20 percent; their witness Smith's figure was 10.45 percent. The Chessie study showed the results at discount rates of 0, 10, and 20 percent to indicate a range, without endorsing any specific figure. The GPs' argument also fails to take account of Shannon's adjustments, some of which, as indicated, do not appear to be disputed.

285. Barnett admitted that he had not studied EL's rehabilitation figures and, indeed, that he was generally unfamiliar with EL's case. Barnett (D) (May 30, 1980) at 56-57, EL App. H at 8-9.

286. Exhibit 8 to Shannon's testimony for EL is a letter dated January 27, 1975, from the President of the Missouri Pacific objecting to designation of PC east-west lines to Western carriers and stating that if this should be given serious consideration, "MoPac hereby suggests

and proposes that PC and EL segments be granted to MP either exclusively or as a participating owner and user as shown on the attachment." Unfortunately the "attachment" is not attached.

287. EL Map 3 shows how well the routes of EL-LV between Sterling and the Northern New Jersey terminal would have fit the Chessie system. In addition to providing a direct line between Chicago and New York in place of the multi-carrier route through Shippensburg, Pennsylvania, the acquisition would have given Chessie an effective route south of Lake Erie between Buffalo and Chicago, thus enabling it to abandon its operation across Canada. EL's branch between Warren and Cleveland, Ohio, would have shortened Chessie's route between Cleveland and the East.

288. The latter figure is for a Chessie acquisition of EL *and* LV.

289. Jennison is a Vice President of Wyer, Dick & Co. and has been associated with that company since 1961. Prior to that, he held several management positions with the Bangor & Aroostook Railway.

290. We have been particularly unimpressed by the adjustments to their study proposed by GP witness Scheer. Scheer (S) (Jan. 30, 1980). These were torn in shreds in EL's opening freight brief, 2 ELF at 319-37, and the GPs' reply brief made almost no effort to rehabilitate them.

291. Indeed, the GPs' criticism of Laurie for not having introduced more variables with respect to the changed ownership of other roads contrasts strangely with their objection to EL's having submitted four separate disposition proposals. 1 GP at A 69.

292. The figures for 1969-75 are as follows:

Year	Revenue Ton Miles
1969	15,505,454
1970	15,039,019
1971	13,786,020
1972	13,293,395
1973	14,206,262
1974	12,882,200
1975	9,562,398

Appendix H

Corresponding figures for LV are:

Year	Revenue Ton Miles
1969	3,140,579
1970	2,915,181
1971	2,474,872
1972	2,653,256
1973	3,230,572
1974	3,602,720
1975	2,911,924

R. Murphy (S) (Jan. 30, 1980) Apps. 6, 8.

293. The GPs also attack Shannon's estimate that traffic diverted from trucks in a Western acquisition, an addition to revenue that the GPs sharply question, could have been handled at a revenue ratio of only 60 percent. They assert that at the very least Shannon should have used Jennison's incremental ratio of 71.4 percent, which would have reduced annual net railway operating income by approximately $2 million. EL responds that the 60 percent figure is justified since small amounts of traffic are involved, to wit, a 1½ percent annual increase, the average length of haul is great, and there would be no interchange with any other railroads. It also cites ICC rulings that losses or gains of less than 10 percent of traffic would be accompanied by a 50 percent reduction or increase in related costs. See *Pennsylvania R.R. - Merger - New York Central R.R.*, 330 I.C.C. 328, 347-50 (1967); *Norfolk & Western R.R. - Chicago & St. Louis R.R. - Merger, Etc.*, 330 I.C.C. 780, 817 n.21 (1967); *Burlington Northern, Inc. - Control & Merger - St. Louis, San Francisco R.R.*, 360 I.C.C. 783, 1110, 1123 (1980) (47 percent of lost revenues would be saved by lowered costs).

294. EL also makes an extended argument to show that its application of system average switching costs in the EL-LV combination overstated rather than understated such costs. This is because the average, reflecting supposedly higher New Jersey costs, was applied outside New Jersey, whereas New Jersey switching costs were based on the JTs studies. In light of our conclusion with respect to the JTs, it is unnecessary to consider this argument. ELRB at 124-26.

295. Because of differences in the amount of property to be conveyed, these amounts differed as between the different acquisitions.

296. This yard was not included in the Chessie acquisition since Marion is west of Sterling, Ohio, where EL and Chessie connect. EL also points to testimony by Shannon, Shannon (D) (July 10, 1979) at 1096-1103, EL App. O at 487-94, that a Western acquirer could have achieved savings comparable to these contemplated for the reconstructed Marion Yard by using its own yards at or west of Chicago, without having to entail the capital costs estimated for the Marion Yard. However, Shannon conservatively took no account of this.

297. This yard was not included in the EL-LV combinations, since most of the service previously performed at Croxton would be performed by LV's Oak Island Yard.

298. In making this seemingly high estimate Shannon compared the location of EL traffic officers and those of Chessie, Norfolk & Western, and Santa Fe. Using a color coding, he found that virtually all EL's traffic offices were duplicative and that substantially all their work could have been done by employees of the purchaser. Shannon noted that his estimates of savings in traffic department costs were supported by the Chessie study. Shannon (S) (EL) (Dec. 31, 1979) at 84, *id.* at Ex. 13.

299. Moon is President of Albert E. Moon Analytical Services, Inc. He is the former director of Transportation Program Development in the Transportation and Industrial Systems Center of Stanford Research Institute.

300. Shannon's study was property-specific in the case of the traffic offices. We frankly doubt "the benefit of looking at the employees, offices or properties hypothetically merged" in the case of many of the overhead accounts. Looking at the chief executive of EL or at his office is hardly necessary to support the conclusion that in a merger he would have disappeared as such; the question is whether he might not have continued in some other executive capacity. Experience is a better guide on this question than visual inspection.

301. Wyer Dick also studied the Union Pacific - Rock Island merger, which never came to fruition, and the Louisville & Nashville-Chicago & Eastern Illinois merger, which went through on a radically reconfigured basis.

302. The GPs also quoted a 1972 report prepared by the Staff of the Senate Commerce Committee on the Pennsylvania - New York Central merger, which minimized the savings expectable in railroad mergers. EL, however, cited a much earlier report by the Senate Commerce

Committee, 86th Cong., 1st Sess., Report No. 445 at 244 (June 1961), saying that "[t]he savings in organizational expenses do not constitute the major areas of savings, but are perhaps the least controversial."

303. This was what Chessie did. As indicated, Shannon testified that Chessie's results were comparable with his own, and we have not discovered any contradiction of this. See Statement of the EL Trustee in Response to Court's May 21, 1981, Memorandum (June 1, 1981) at Part I, Sp. Ct. Rep. at N 35802-06.

304. Since none of the proposals for continued freight use advanced by EL involved the reconstruction of the Poughkeepsie Bridge, which would be essential to revival of the Maybrook gateway to New England or operation by the acquirer down the east bank of the Hudson, the much bandied about $100 million figure is illusory, except insofar as Rossi stated that "[i]nternally our position was that if Chessie insisted upon up to $100 million to make the acquisition as proposed in the Final System Plan, that money would have been committed", Rossi (S) (Dec. 31, 1978) at 8.

305. The EL-LV proposals involve converting most of the EL line east of Waverly from double to single track and using the LV line from Waverly to Newark to carry the bulk of the traffic between points west of Waverly and the Northern New Jersey - New York City areas. While the line through Port Jervis would be equipped with a modern signalling system and would remain capable of carrying substantial freight traffic, it may be doubted whether this is what Commissioner Schuler had in mind when he spoke of maintaining the Port Jervis line "as a main east-west freight line".

306. See Memorandum of the EL Trustees in Response to the Court's Letter of June 19, 1981, (July 10, 1981) at 6-7, Sp. Ct. Rep. at N 36159-60.

307. The GPs note the "brief time" allowed them to comment on the EL's July 10 submission. GPs' Response to July 10, 1981, Filings of Erie (July 24, 1981) at i, Sp. Ct. Rep. at N 36345. We do not believe that the two weeks allowed the GPs were insufficient. Given the essentially simple approach to the problem taken by EL, the paucity of criticism contained in the GPs' Response indicates to us that more time would not have profited the GPs significantly. More important, if the GPs believed they needed more time, they could have requested an extension as they have done on other occasions.

308. There is no inconsistency between this holding and our order with respect to evidence tendered by North Penn and Delaware & Bound Brook on October 15, 1980. See Memorandum and Order on Motion of GPs to Strike Direct Evidence Tendered on October 15, 1980, by North Penn and Delaware & Bound Brook (November 13, 1980), Sp. Ct. Rep. N 22612. In their initial evidentiary submissions, North Penn and Delaware & Bound Brook sought to show that their lines would have been acquired by a public body for a price based on their net liquidation value. Two years after the close of direct evidence from the Ts, North Penn and Delaware & Bound Brook sought to introduce evidence showing that their lines would have been acquired by a private railroad on the basis of earnings value. The evidence submitted covered a wide range of topics wholly unrelated to and heretofore unmentioned by the parties' initial witnesses. But for an ambiguous letter sent by the court in June of 1980, see Memorandum and Order of Nov. 13, 1980, *supra*, at 5-8, Sp. Ct. Rep. at N 22616-19, we would have granted the GPs' motion to strike this evidence. The differences between EL's position and that of North Penn and Delaware & Bound Brook are glaring. Rather than seeking to present a wholly new and inconsistent case relying on evidence unrelated to prior submissions, EL's July 10, 1981, memorandum discusses a contention previously endorsed by two witnesses and relies completely on materials already in the record.

309. For example, the cost of originating or terminating a TOFC in the JT's study was projected to be $124.99 per car. Under Jennison's study the historic cost was $89.59 per car for EL and $75.59 per car for LV. As a result of this and other adjustments, the total cost of operating EL's retained traffic fell from $234,983,000 in the EL-LV without JT Western acquisition to $229,371,000 when the JT assumption was abandoned. The total cost excluding overhead of operating LV traffic fell from $57,421,000 to $53,683,000. Workpapers to Memorandum of the Erie Lackawanna Trustees in Response to Court's Letter of June 19, 1981, (July 10, 1981) at 3-4. Similarly the total cost for the EL-LV Chessie acquisition fell from $165,716,000 to $160,130,000 for EL and from $50,083,000 to $46,343,000 for LV when the JT assumption was abandoned. *Id.* at 5-6.

310. EL and the GPs agreed to a great extent over how this adjustment should be made. The one point they could not resolve among themselves is whether revenues and costs associated with six particular traffic movements over LV's lines and certain other LV/CNJ revenues should be adjusted. We believe that EL's treatment is the correct one

since it is not proper to take out revenues and costs for traffic that were not originally included. See Reply of EL to GPs' Response to Court's September 24, 1981, Letter (Sept. 24, 1981) at 4-5, Sp. Ct. Rep. at N 37094-95.

The GPs also contended that additional New Jersey property taxes for the LV $403,000 should be included as a cost of operating the EL-LV lines and that maintenance of way expenses for the Phillipsburg to Port Morris lines should reflect the fact that that line is projected to be upgraded to a heavy density main line. We agree.

The GPs finally argue, GP's Response to July 10, 1981, Filings of EL at 8-9, Sp. Ct. Rep. at N 36352-53, that the points at which CNJ and EL-LV interchanged traffic would have been the subject of negotiation and that without determining those interchange points, the division of revenues between EL-LV and CNJ cannot be determined. The implication is that CNJ would have been able to lengthen its average haul at the expense of EL-LV. However, it is equally if not more likely that CNJ would have lost rather than gained in these negotiations since the combined EL-LV would have been a stronger competitor than either railroad had been individually. We assume, therefore, that the historic traffic patterns would have remained intact.

311. Applications to abandon operation of these ferries were pending before the ICC.

312. This segment included a 6.5-mile branch from Pittsfield to Saline, Michigan, to service a Ford plant. All references to the segment include the Saline branch.

313. The GPs also argue that the ICC would not have permitted any segmentation of AA. It may well be that AA would not have been entitled to abandon the losing segments if the Toledo-Ann Arbor segment produced a profit sufficient to cover the deficits on the losers and provide a fair return on the entire investment. However, no one contends that this was the case.

314. In light of our earlier conclusions, see pp. 282-86, *supra*, there would be no need for us to consider whether Michigan had the statutory capacity to acquire and operate rail lines. In any event an affirmative answer is compelled by the Advisory Opinion of the Supreme Court of Michigan, cited *infra*.

315. Although AA does not suggest this, some of the profits might remain available because of Michigan's ability to finance the purchase

at lower interest rates commanded by tax exempt securities as compared to those a private acquirer would have to pay.

316. It is significant that, in contrast to the parade of officials from the Northeastern States whom the GPs called to testify that these states would not have been willing to purchase Ts' freight lines, they called no official to give similar testimony with respect to Michigan. While AA likewise called no Michigan official, this was unnecessary in light of its documentary case.

317. The GPs do emphasize that with the Rail Act, Michigan pleaded to the federal government for funding, 4 GP at R 176-78, but for the reasons outlined previously, see p. 213, *supra,* such statements provide little indication of what a public body would have done if federal funds had been unavailable.

318. An example much discussed in the briefs concerns the shipment of cement from Dundee, Michigan, (on AA's Toledo-Ann Arbor segment) to Florida. While AA was under D,T&I's control, although AA could have carried this as far as Toledo, this traffic was carried by AA only to Diann, Michigan, where AA connected with D,T&I, thence over the entire length of D,T&I to points in Southern Ohio, and thence over the lines of other carriers to points in Florida. If an acquirer of one or more of the IFLs purchased AA, it would follow the same policy of obtaining the long haul. If all the IFLs were acquired by one purchaser as proposed in AA's initial case, it would have gotten the longest haul by carrying the traffic to Toledo and thence to Potomac Yard near Washington, D.C., where it would have turned the traffic over to the Richmond, Fredericksburg & Potomac R.R. From the standpoint of D,T&I it would be inconsequential whether a single purchaser acquired all the IFLs or a different purchaser acquired the Detroit-Cincinnati IFL. Either would have been in a position to divert much of the substantial traffic that AA had exchanged with D,T&I at Diann. See AA at 68-70.

319. We discuss below the GPs' argument that it is impermissible for us to consider an acquirer of IFLs.

320. Indeed, one of the GPs own witnesses with respect to AA, Evan Allen, had prepared a valuation study of a possible acquisition of D,T&I when he was a senior financial analyst for Southern, in which he included the value of revenues from D,T&I traffic that could be routed onto Southern's line. Allen & Kozu (D) (July 10, 1980) at 754, 1 AA Supp. App. at 19-21.

321. The GPs also contended that the diversion featured in Laurie's initial testimony, see note 318, *supra*, would not have been feared since the service via Potomac Yard would have been slower than that historically provided. Laurie effectively refuted this in his rebuttal testimony, Laurie (S) (Oct. 15, 1980) at 4-6, by showing, on the basis of timetables, that the time would have been the same.

322. See note 57, *supra*.

323. Laurie added, Laurie (S) (Oct. 15, 1980) Ex. 5 at 6, in line with Shannon's testimony, that the Seaboard Coast Line through its subsidiary, the Louisville & Nashville, was another possible acquirer of the Detroit-Toledo-Cincinnati segment and that if it succeeded in making that acquisition, it would have had an interest in the Ann Arbor-Toledo segment similar to Southern's and would have had roughly similar off-segment earnings. While this suggestion produces a second bidder for the Detroit-Cincinnati IFL, it does not add to the number of bidders for the Ann Arbor-Toledo segment.

If the diversion of southbound traffic on the segment to Potomac Yard was as important as Laurie's initial study indicated, we would suppose that a purchaser of the Chicago-Toledo-Cleveland-Buffalo-New York IFL might have an interest in the segment, but AA has not suggested this possibility and we shall disregard it.

324. The situation would be different if the Trustees of PC and AA had offered the Detroit-Cincinnati line and the Ann Arbor-Toledo segment as a package, but there is no evidence that this was ever considered.

325. The GPs attempt to weaken this, 1 GPRB at 3 n.4, by arguing that Wilmot uniformly disregarded potential diversions of traffic to PC lines because of his belief that these would be offset by potential losses and therefore "implicitly" credited the IFL with off-segment revenue by not deducting revenues that hypothetically would be lost. Whatever the merits of the argument might be in other contexts, *e.g.*, acquisition of an east-west line by a Western carrier where diversion of traffic to the acquirer might provoke retaliation by other Western lines, the GPs have not pointed out what retaliation D,T&I would have been in position to administer if an acquirer of the segment routed traffic to Toledo and thence to Cincinnati.

326. The force of the answer is diminished by the fact that, as owner of 99+ percent of AA stock, D,T&I was not truly concerned whether

the plant was served solely by AA of by itself as well. Much the same comment applies to PC, which owned 99+ percent of D,T&I.

327. We note in passing the inconsistency of the GPs' argument about the PC on this phase of the case and their objection, discussed above, to our considering the acquirer of a PC line as a potential bidder.

328. See note 289, *supra.*

329. Jennison states that his purpose was to permit Laurie "to estimate the impacts upon the profit levels of Penn Central and the Detroit, Toledo & Ironton Railroad that would have been associated with the abandonment of the Ann Arbor". Jennison (S) (AA) (Dec. 31, 1978) at 2. While this was a meaningful statement for D,T&I, except that Laurie contemplated not an abandonment of the segment but its acquisition by a competitor, it was meaningless with respect to PC, where the problem was to measure the cost of handling added traffic. Implicitly, Jennison assumed that the cost-revenue ratio for moderate amounts of lost traffic is the same as the one for moderate gains in traffic. Since the GPs do not challenge this assumption, we see no reason to question it.

330. The difference in the PC and D,T&I ratios is not due to the choice of different percentages or variability but to the relative importance of different accounts.

331. This was preserved by an order of Judge Thomsen, Laurie (D) (Feb. 3, 1981) 275, 278, 1 AA Supp. App. at 312, 313.

332. The figures come from AA's Quarterly Reports for Freight Commodity Statistics. They show a marked decrease in cement and auto parts origination in 1974 as against 1973 but a slight increase in American Motors jeeps.

333. Although the GPs had no opportunity to answer this argument in briefs, excerpts from the Quarterly Reports introduced in rebuttal would seem to be self-authenticating under Rule 902(5). Alternatively, all the reports may be subject to judicial notice under Rule 201.

334. The GPs also rely on a study made by Peat, Marwick, Mitchell & Co. for the AA reorganization trustee to determine whether AA could attain viability under any one of ten different configurations. One of these, and operation from Toledo to Whitmore Lake, only 9.5 miles north of Ann Arbor, is alleged to correspond closely to the Ann Arbor-Toledo segment. Peat Marwick's conclusion with respect to the viability of this operation, as of all the others, was negative. Laughlin (S)

(Dec. 31, 1978) at V 2-3. The GPs also cite a statement of an AA witness that Peat Marwick gave preliminary consideration to the Ann Arbor-Toledo segment itself but rejected this as less attractive than inclusion of the 9.5 miles north of Ann Arbor, Laughlin (D) (June 6, 1979) at 6, 13 GP Supp. App. at 431. AA's reply brief, AARB at 73-76, answers this in detail, pointing out significant differences in the assumptions underlying the Peat Marwick and the Laurie studies. The most important is that the Peat Marwick study assumed the operation of two daily sets of trains and crews, one between Whitmore Lake and Dundee and the other between Dundee and Toledo, while Laurie's study contemplated only one. We find AA's refutation persuasive.

335. L&NE points to a proposal made in 1972 by the LV Trustees, with the approval of the Attorney General of the United States, wherein the LV Trustees offered to pay $1,000,000 for L&NE's stock being held by the Attorney General and to guarantee $2.5 million in L&NE outstanding mortgage bonds, and the Attorney General also approved a credit of $5 million to be applied against the debt of L&NE's parent, CNJ, to the United States. This offer did not take account of the prospect of isolation of the Tamaqua branch. Moreover, it was subject to the approval of the LV and CNJ reorganization courts.

L&NE also submitted three offers made by private persons to the Department of Justice in 1975. The value of these offers, which assumed continuance of the Tamaqua branch and contained numerous conditions, is difficult to appraise, and L&NE offered no evidence (other than that contained in some of the offers themselves) as to the financial responsibility of the offerors. Moreover, the federal rule appears to be that a condemnee may not rely on offers to show market value. *Sharp* v. *United States*, 191 U.S. 341 (1903); see 4 Nichols, Eminent Domain, § 12.311[2] (1979). Although we would question some of Justice Peckham's reasoning in a case where the condemnee demonstrated the financial worth and *bona fides* of the offeror, these conditions were not met here.

336. According to Timpany, Sagner told him on July 24 that he had concluded not to proceed with a tender offer. Timpany (S) (Dec. 31, 1978) at 29. But on July 26, when Sagner requested the Peabody study, one of the questions he wanted answered was whether to make a tender offer. Stangl (D) (Mar. 25, 1980) Ex. 18, I CNJ App. at 424. Similarly, Goodstein, who, like Timpany, testified on CNJ's behalf, testified that Sagner was still considering that possibility on July 30.

Goodstein advised Sagner against it. Goodstein (S) (Dec. 31, 1978) at 7-9.

337. As we have noted elsewhere, the term "net liquidation value" has taken on something of a specialized meaning in this litigation, one that includes sales for rail use as well as scrap sales. See *In the Matter of the Valuation Proceedings*, 425 F.Supp. 266, 282; *CMV Opinion*, 445 F.Supp. 994, 1004. As the term is used here and elsewhere in CNJ's evidence, however, it refers more conventionally to scrap sale value of physical rail assets. However, even that term means different things to different parties, see pp. 28-31, *supra*.

338. These later events also suggest that Sagner's recollection of the July 18 meeting is far more likely to be accurate than Crane's since Sagner's action are inconsistent with his previously having made a detailed offer for CNJ's property.

339. They are:

a. $119,800,000: Goodstein's proposal of July 18 ($25 million cash plus assumption of obligations estimated at $94,800,000). Goodstein (S) (Dec. 31, 1978) at 7.

b. $117,907,000: New Jersey Department of Transportation's valuation of CNJ's net liquidation value as of 1974 adjusted to omit PC's half-interest in New York & Long Branch Railroad. Jacoby (S) (Dec. 31, 1978) Ex. 64 at 1.

c. $112,981,000: Peabody's valuation of net liquidation value as of December 31, 1973. Jacoby (S) (Dec. 31, 1978) Ex. 62 at ii.

d. $105 million: Timpany's proposal of July 26. Timpany (S)(Dec. 31, 1978) Ex. 18.

e. $100 million: Timpany's estimate in testimony of the probable sale price. Timpany (S) (Dec. 31, 1978) at 52.

f. $100 million: The bondholders' first suggested price at the March 21 meeting. Goodstein (S) (Dec. 31, 1978) at 5.

g. $80 million: Sagner's reported statement at the July 24 meeting that he "understood" the State would have to assume obligations. Timpany (S) (Dec. 31, 1978) at 29.

h. $79,654,000: Wyer Dick valuation of net liquidation value as of June 30, 1968. Timpany (S) (Dec. 31, 1978) Ex. 19, I CNJ App. at 29-34. Also adopted as a finding of fact by the United

States Secretary of Transportation. Timpany (S) (Dec. 31, 1978) at 52.

i. $71.5 million: Book value of the conveyed assets. Timpany (S) (Dec. 31, 1978) at 59.

j. $70-80 million: Sagner's estimate of net liquidation value at the August 23 meeting. Jacoby (S) (Dec. 31, 1978) Ex. 60 at 2.

k. $25 million over all prior indebtedness: The bondholders' second suggested price at the March 21 meeting. Timpany (S) (Dec. 31, 1978) at 5.

l. Fifty percent of the face value of the bonds: Sagner's suggested price at the March 21 meeting; estimated to result in $21 million over debt. Timpany (S) (Dec. 31, 1978) at 5.

340. Although CNJ suggests in its brief that Chessie had long been interested in CNJ, *e.g.*, CNJ at 155-57, there is no contention that anyone other than New Jersey would have bought CNJ for rail use.

341. We note, however, that most of the discrepancies between the JTTs' case and CNJ's proffer in the North Jersey terminal area concern CNJ lines not conveyed to USRA and, therefore, not part of this suit. Other discrepancies disappear by virtue of our rejection of the JT proposal, see Part XI.

342. Long before trial we warned the parties that:

> As at present advised, the Court is not disposed to entertain argument that any transferor would have obtained a strategic advantage over other transferors (as distinguished from such advantages as ending of deterioration, entitlement to interest, etc.) by negotiating or consummating a disposition at an earlier date than other transferors.

Second Pre-Trial Order at 4, Sp. Ct. Rep. at N 11801-02. We have since remarked that:

> While, as indicated by the language, that view is not frozen in stone, we could not properly depart from it without being fully advised of the effect of such a departure on the Government Parties and other transferors.

Memorandum and Order of April 23, 1980, at 4, Sp. Ct. Rep. at N 20242. There is room for debate as to whether CNJ's proffer violates the letter or spirit of these admonitions. Nevertheless, the point is moot. The only "strategic advantage" CNJ might have garnered from its timing contentions would be a favored position for certain CNJ properties as compared with other Ts' properties—for example, a conclusion that, because of CNJ's early disposition, New Jersey would have acquired CNJ's Phillipsburg-to-Newark line rather than LV's parallel line. Since we have already concluded (without considering the effect of timing) that all of CNJ's properties would have been purchased for rail use, it is unnecessary to decide whether CNJ may invoke its timing allegations to establish that point.

343. CNJ devotes several pages of its brief, with quotations from and citations to the evidence, to its contentions concerning LV, R, and EL. CNJ at 121-24. In contrast, its sole statement concerning PC is this: "Whether PC was truly ready to seek to liquidate (in view of the risks of traffic diversions by the other Transferors, the views previously noted of the Federal Railroad Administration, its own views of a profitable core, and the downside risks of a liquidation elaborated in the CUE Opinion) *is an interesting question.*" CNJ at 124-25 (emphasis added).

344. CNJ asserts that the State had encouraged the bondholders to seek a total shutdown in December 1972. CNJ at 131. The evidence cited for the assertion, however, is only the conclusory impression of Roger Ward, a bondholders' representative, Ward (S) (Dec. 31, 1978) at 24-25, II CNJ App. at 167-68; it is not backed up by any alleged oral or written statements by any State official. Moreover, even if the State did give such encouragement, it did so only in contemplation of a purchase of CNJ by LV and R. There was no prospect of such a purchase in the fall of 1973.

345. Indeed, CNJ goes so far as to request us to find that even without any sale of rail use CNJ would have realized $100 million in actual liquidation for scrap. CNJ at 163.

346. In light of the pending settlement between the GPs and EL, we, of course, do not expect EL to petition for reconsideration nor do we expect the GPs to raise issues relating solely to EL. If the settlement should not be approved, we will entertain applications for reconsideration for EL and from the GPs in respect of El.

APPENDIX I

Appendix 1

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

FILED JAN. 25, 1982 JAMES F. DAVEY, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER SECTIONS 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

Opinion on Petitions for Reconsideration of Rail Use Opinion

PER CURIAM:

We deal in this opinion with petitions for reconsideration of our Rail Use Opinion dated November 24, 1981, which were filed on December 29, 1981, by the Trustee of the Lehigh Valley Railroad (LV) and the GPs.[1] We called on the adverse parties to answer these petitions on January 11, 1982.

THE LV PETITION

A. *Valuation Methodology*

The LV petition raises three points concerning Part VII of the opinion entitled Valuation Methodology. These are (1) that "the conservative assumption in the EL-LV pro forma that there would be no growth in cash flows after the terminal year should result in a lower cost of equity than 20%"; (2) that the inflation factor used by the Court in deriving the discount rate was understated; and (3) that use of the DCF methodology requires that

1. A petition for clarification or reconsideration filed by the Trustee of the Ann Arbor Railroad on December 23, 1981, Sp. Ct. Rep. N 38766, has been determined by an order dated January 11, 1982, Sp. Ct. Rep. N 38958.

the EL-LV cash flows be restated to account for tax savings resulting from depreciation. We find no merit in any of these points.

(1) LV's argument is that in using a 20% cost of equity for EL-LV, which was derived in part from PC witness F. Smith's figure of 22.5% for the IFLs, we failed to take account of the fact that whereas Smith's cash flows were projected to increase after the terminal year, to wit, 1985, at an annual rate of 2%, witness Shannon did not include any growth in the EL-LV traffic base after the fifth year.[2] This, LV argues, is an element of conservatism which should be reflected by a reduction in the cost of equity to 19%.

Apart from other considerations, this claim shatters on the rock, pointed out by the GPs (Answer, pp. 5-7), that Shannon's projections for EL-LV were actually less conservative than those for the IFLs. The projections for the IFLs were stated in nominal dollars and, as LV correctly points out, contained the assumption that revenues, in nominal dollars, would grow at a 2% rate. When combined with the effect of long-term inflation, which the parties generally projected to be from 5-6%, see GPs' Answer, p. 6, the *real* cash flow was not projected to keep up with inflation. See Myers (S) (PC) (Dec. 1, 1978) at 15; F. Smith (D) (Aug. 22, 1980) at 1818, 19 GP Supp. App. at 346. In contrast, the EL-LV projections, which were stated in real dollars, assumed that cash flow would remain constant in real terms. Thus the El-LV projections were in this respect riskier than those for PC since EL-LV assumed that cash flow would keep up with inflation.

(2) LV's second point is that we erred (Opinion at 66) in using 5.58% as the factor for deflating the 15.22% nominal AWCC to derive a real AWCC of 9.13%. The 5.58% figure was the arithmetic average of the yearly inflation rates forecast by Dr. Olsen for the IFL projections. Smith (S) (GPs) (Jan. 30,

2. LV adopted all of EL's evidence dealing with the EL-LV combination. See LV Summary of the Testimony (Dec. 31, 1978) at 2-3, 25; LV Opening Brief at 8.

1980) at 154-55. These rates were 6% for the period 1974-80 and 5% for the period 1981-85. LV's argument is that since Shannon's projections were made for only five years, we should have used Dr. Olsen's 6% figure.

This contention ignores the nature of a capitalization of earnings on the discounting of cash flows. Even when only the terminal year's figures are selected, the assumption is that these will continue. As the GPs put it (Answer, p. 11), "[c]apitalization of the fifth-year earnings for EL-LV has the obvious effect of extending the projections in perpetuity."

(3) LV's third claim is that in translating the Shannon pro forma forecasts of earnings for the fifth year of operations into forecasts of cash flows, the court erred in using Shannon's estimates of depreciation rather than what LV contends would have been higher figures that would have been used in a cash flow analysis. The argument is that "both the buyer and seller of EL-LV, in determining the most they would be willing to pay and accept, respectively, would have determined the most that the buyer could get from the property" (Petition, p. 12); that in an earnings analysis this would be achieved by using the lowest depreciation rates consistent with generally accepted accounting principles; but that in a cash flow analysis the acquirer would adopt the highest rates permitted under the income tax laws since depreciation is not deducted from cash flow but higher depreciation will result in lower taxes. Also, under an earnings analysis, the purchase price will be allocated to nondepreciable assets so far as permitted by the contract and generally accepted accounting principles; *per contra* when the analysis is on a cash flow basis. LV has filed with its petition for reconsideration twelve pages of new calculations which purport to demonstrate that the latter adjustment alone would enhance the EL-LV cash flows for a five year period by $19,735,000.

We agree with the GPs that this contention comes too late. The GPs argued in their initial submissions that cash flow rather than earnings constituted the proper valuation methodology, F.

Smith (S) (Jan. 31, 1979) at 19-23, as indeed PC had also done, Hallingby (Dec. 1, 1978) at 21. This has always been a major issue in the case. See Opinion at 49-55. LV could not simply sit back and assume that the court would decide in favor of the capitalized earnings method. Indeed, our letter of June 19, 1981, Sp. Ct. Rep. N 36204, expressly requested EL and LV to provide us with cash flow projections based on their pro forma earnings statements, and they did. If LV considered that lower figures for depreciation ought to be used should the court opt for the cash flow method, it was bound both to raise the point and to quantify it by presenting calculations which the GPs could challenge. The GPs question many of the assumptions and computations which LV makes in its present effort to show that larger depreciation deductions would have greatly increased EL-LV's after tax cash flow. We do not reach such questions since, as a result of LV's failure adequately to raise the point that it would have had higher depreciation deductions and consequently lower income taxes on a cash flow method during the trial or even during the post-trial submissions (Opinion at 15), the record is not adequate for us to decide them.

B. *Labor Protection Costs*

LV also asks us to reconsider three aspects of Part IX of the opinion, relating to Labor Protection Costs.

(1) *Pre-Day One Attrition.*

The first is our refusal to take account of "pre-day one attrition" (*i.e.*, attrition prior to the conveyance date) beyond the six month period reflected in Table 35, Opinion at 156. This was a considered decision made partly in the interests of conservatism, Opinion at 163, and partly because, as stated in note 175, p. lii, "[t]he LPC studies made by the parties did not attempt to quantify the effect of a later acquisition date on LPCs" and the record was "devoid of evidence that would permit us to make such a

calculation . . . ." We see no reason to depart from that decision. LV's own witness, W. Arthur Grotz, made no allowance for pre-day one attrition, Grotz (S) (Oct. 15, 1980) at 13-14; Grotz (D) (Jan. 22, 1981) at 186-87, in part because he thought that LV would need its quota of employees to run the railroad until the ICC permitted abandonments. Grotz (D) (Jan. 22, 1981) at 125-26, 723; Ex. GPS-Grotz-Labor (X)-16, 25 GP Supp. App. 122P, 251A. While LV might have been able to persuade a prospective purchaser that pre-day one attrition would have produced lower LPC's than those estimated in our Opinion, we find no basis in the record or in good sense for thinking that this would have been of an order of magnitude approaching the 50% which LV now asks us to adopt.

(2) *Transfer of Displaced LV Employees to Parallel EL Lines in New York*

LV urges that Grotz's estimates of displaced LV employees were based on a LV "stand-alone" hypothesis and require adjustment in light of our conclusion that the most likely outcome for LV was to sell its lines east of Waverly, N.Y., as part of an EL-LV purchase. The employees on the abandoned lines west of Waverly, LV alleges, would simply have moved over to the "parallel" EL lines in order to handle the traffic contributed to those lines by the LV lines east of Waverly. Shannon gave brief testimony to this effect. Shannon (S) (Oct. 15, 1980) at 15. In support of this LV points to our acceptance, Opinion at 141, of EL's contention that employees surplussed as a result of abandonment of its Scranton line would move over to LV's Waverly-Newark line.

We note initially that, notwithstanding his unexplained statement to the contrary, Grotz's estimate of the number of positions that would have been required to operate the LV system on Day One is applicable to the EL-LV acquisition as well as to the LV stand-alone case. Grotz testified that he derived his estimate of the manning requirements of the LV system from "the actual

employment of former LV personnel by the Trustee after conveyance to Conrail in 1976". Grotz (S) (Oct. 15, 1980) at 16. He justified this methodology on the ground that "LV contends that *the same properties would have been kept in rail use* absent the Rail Act as were in fact conveyed to Conrail". *Id.* (emphasis added). On this theory, however, Grotz's conclusions regarding manning requirements in the LV stand-alone case would be equally applicable to the EL-LV acquisition, since, as the GPs point out (Answer, p. 23), there was virtually no difference in the "properties [that] would have been kept in rail use". Thus, the Opinion's reliance on the Grotz study in calculating the number of employees that would have been required to operate LV's lines in the EL-LV acquisition was proper.

There remains, however, the question whether the Court improperly relied upon Grotz's treatment of the possibility of the transfer of LV's New York State employees to EL's lines. Grotz did not think, as Shannon did, Shannon (S) (Oct. 15, 1980) at 15, that LV's New York State employees would be transferred wholesale to EL's New York lines, but instead testified that these employees would have been rehired into attrition-opened positions in the LV system, Grotz (S) (Oct. 15, 1980) at 16, 24, 31-32. On the other hand, Grotz's testimony was addressed to LV's "stand-alone" case and there is no indication that he focused on an EL-LV package.

LV's Petition thus raises a legitimate point. In most of the parties' discussions of LPCs, the Ts were treated largely as individual units. After we accepted the EL-LV package, however, the possibility arose of two Ts, *i.e.*, LV and EL, cooperating to reduce one another's LPCs, and Shannon did testify, although only in a conclusory fashion, on the issue now raised by LV.

We think that in EL-LV's negotiations with an acquirer some allowance would have been made for the possibility of cooperation between EL and LV to reduce total LPCs. The acquirer, of course, would not have accepted arguments based upon a premise that vacancies in one system would be filled by employees from

both systems, which would be a form of double-counting. In addition, because of possible difficulties—relating, for example, to geographical restrictions, union restrictions and timing considerations—in effecting "inter-corporate" transfers, we think potential acquirers would have demanded an extremely conservative approach to this issue.

Based on the foregoing considerations, we believe that only a limited number of LV's New York State employees would have been transferred to EL's parallel lines. We think an acquirer would have been willing to treat roughly a third of the 299 LV Maintenance of Way, Maintenance of Equipment and Train and Engine employees in New York State as able to find work on the EL lines. This would reflect an acquirer's uncertainty regarding "inter-corporate" transfers. Moreover, it would permit a rough equivalence of transfers between EL and LV, thus avoiding the need to "settle accounts" between EL and LV, since in the Opinion we decided that 90 EL employees would find work on LV's lines, Opinion at 141. We conclude therefore that 90 LV employees would also have found work on EL's lines. This requires reducing the figures for 4/76 in Table 37 from 281 to 191, and, following this change through Tables 38-42, results in subtracting separation payments, dismissal allowances, and fringe benefits attributable to these employees from our calculations of LV's LPCs. The parties should have no difficulty in making these calculations. If this conclusion still is less favorable to LV than our corresponding treatment of EL, a sufficient answer is that the latter was unchallenged.[3]

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3. Beyond this there would have been greater ease of transfer for EL employees. Although the surplussed LV employees were based primarily in Sayre, Pa., and Buffalo, N.Y., there would have been some problem with respect to the Buffalo employees since no former LV traffic would move over EL's Buffalo branch. Shannon appears to have conceded in his deposition that LV's Buffalo employees would require special treatment, Shannon (D) (Jan. 15, 1981) at 707; when he was pressed on the issue, it became apparent that he had made no detailed study of LV's operations in the Sayre-Buffalo area, *id.* at 704-07, 720-22.

(3) *Dismissal Allowances*

The Opinion decided that the labor protection benefits that would have been accorded the Ts' employees would have been reached through negotiations and would have been based roughly on the pattern of the New Orleans conditions, Opinion at 114-18. LV's final point with respect to Part IX of the Opinion is that we "departed from [the *New Orleans*] pattern in certain significant respects". Petition, p. 26. Although LV's observation is correct, that departure was the result of a considered decision. As our discussion of the *New Orleans* conditions, Opinion at 117, indicates, we were well aware that those conditions provided only for "residual" WJPA benefits in the fifth year following acquisition. However, as emphasized, Opinion at 117, we said only that the labor protection bargaining process "would have settled on levels of labor protection *roughly equivalent* to the *New Orleans* conditions", (emphasis added), and that the parties would have reached a "compromise based *roughly* on historical levels of labor protection". *Id.* at 116 (emphasis added). We similarly departed from or added to the *New Orleans* conditions with respect to non-union employees and an acquirer's transfer rights. *Id.* at 117-18.

Thus, while occasionally we used the terms "*New Orleans* conditions" and "WJPA conditions" as shorthand references, our calculations were based upon an intentionally simplified form of the *New Orleans* conditions, *e.g.*, Opinion at Tables 28 & 40. We recognized that this increased the Ts' LPCs, yet thought this consistent with the general historical trend towards increased labor protection benefits, discussed in the Opinion at 114-15. We see no reason to alter our original approach.

C. *Trackage Rights Fees*

In section XI.B.5 of the Opinion, we recalculated the trackage rights fees that would have been charged by the public acquirer of EL's New Jersey passenger lines to the private acquirer of the

EL-LV combination, so as to change this from EL's figure of $733,000 per annum to $3,097,888. Opinion at 247-51. LV claims that our estimate of the maintenance component of the trackage rights fees overstates the total costs that would have been borne by a private acquirer.

The initial step in LV's argument is that the court erred in rejecting the $4.3 million maintenance cost figure contained in the study of EL passenger avoidable costs for 1973, Opinion at 249-50. In light of LV's explanations, which the GPs do not contest, we agree.

It follows that Shannon's assignment of $4 million in maintenance costs to the public acquirer of the passenger lines was not excessive since New Jersey had already been paying $300,000 more. Since LV does not contest that passenger service would only have borne approximately 44% of the total maintenance costs for the passenger lines, a $4.3 million share for the state suggests that the total is approximately $9.8 million. Thus the maintenance costs properly chargeable to the freight acquirer through trackage rights fees would be the difference between $9.8 million and $4.3 million, approximately $5.5 million. At first blush, as contended by the GPs (Answer, pp. 31-32), this would justify an upward rather than a downward revision of the trackage rights fees. However, LV argues that the trackage rights fees should be revised downward because the difference between this higher total maintenance cost, $9.8 million, and the total maintenance cost assigned by Shannon for both freight and passenger operations over the passenger lines, approximately $4.8 million, has already been charged to the acquirer of EL-LV. The reason is that Shannon computed the maintenance costs over the freight lines by subtracting his $4.8 million estimate for maintenance costs over the passenger lines from the total reflected in EL's 1973 Form R-1 as adjusted for normalization. Thus, if maintenance costs over the passenger lines should be figured at $9.8 million, rather than $4.8 million, the deduction of the higher figure from Shannon's estimate would result in maintenance costs on the

freight lines being $5 million lower than assessed to EL-LV. Any upward adjustment in trackage rights fees would thus be accompanied by an equivalent diminution of maintenance costs on the freight lines.

LV's argument incorrectly assumes that in accepting EL's maintenance estimates for the freight lines over those of the GPs, Opinion, Part VIII, at 101, we endorsed the methodology behind EL's figures. We were not approving as adequate Shannon's adjustments in EL's 1973 maintenance costs to bring them to a "normalized" level, see Opinion at n.112, since the factual basis for computing the magnitude of those adjustments was not set forth in his testimony. Rather, the Opinion at 101 noted that the GPs' maintenance cost estimates, although far more reliable than their rehabilitation cost estimates, were overstated to some unquantifiable extent. Since the GPs' and EL's estimates were reasonably close, we accepted the latter. This conclusion derived support from the comparison of EL's rehabilitation and maintenance estimates with those contained in the Chessie Study, Opinion at 86-87. Although the Chessie study was not as detailed as that performed by EL, we regarded it as a sound basis for comparison because it was performed by a potential acquirer. We did not find the fact that EL's 10-year total for maintenance and rehabilitation cost was only 85% of Chessie's estimate to be a sufficient basis for discarding EL's figures. However, the GPs point out, Answer, p. 30, that the reduction in maintenance costs on the freight lines implicit in LV's new claims suggests that EL's 10-year total for rehabilitation and maintenance costs on the freight lines is only on the order of 68% of that suggested by the Chessie Study[4]—a divergence of over twice the magnitude originally contemplated. We surely would not have accepted an estimate so much lower than that in the Chessie study. In sum, we

4. The Chessie Study did not include the rehabilitation and maintenance costs for EL's passenger lines. See Shannon (D) (July 10, 1979) Ex. 36 at 1, EL App. B at 201.

accepted Shannon's estimate for what it purported to be, a forecast of maintenance of way expenses on EL's freight lines—not, as LV would now have it, of such expenses plus an additional amount for freight service over the passenger lines.

While we do not totally reject LV's suggestion that what appears to be a newly emergent consensus between the parties on a far higher estimate of maintenance costs on the passenger lines may not imply that maintenance costs which Shannon allocated to the freight lines were somewhat too high, it is too late in the day to undertake the development and analysis of new studies on this subject. We thus will not disturb the conclusion with respect to trackage rights fees reached in the Opinion. That estimate was based upon the computations of EL's own witness as to the respective maintenance costs of the passenger and freight lines, which LV adopted, see note 2, *supra;* we disagreed only as to the proportion of the costs on the passenger lines properly attributable to freight service. To accept LV's present argument would suggest that the calculations EL commissioned Shannon to make—in determining both the quantity of maintenance costs that should be attributed to the New Jersey passenger lines and the allocation of that quantity between passenger and freight use—were completely unnecessary since EL's 1973 maintenance costs could have been adjusted directly by deducting the $4.3 million figure from the passenger avoidable cost study for the State of New Jersey. We see no unfairness in holding LV to what is effectively its own study at this stage of the case in the absence of any reasonable alternative.

D. *New Jersey Taxes*

In n.310 of the Opinion we indicated our agreement with the GPs that EL-LV expenses should be adjusted to include additional New Jersey property taxes for the LV of $403,000. This figure represented the difference between $175,000 which the GP asserted were included in the unit cost calculations for EL-LV

and LV's total New Jersey taxes of $588,000.[5] The GPs found the $588,000 number in Exhibit LVR-Adik-1 at SR 45 and also in LV's 1973 Form R-1, and suggested that the only appropriate modification was "any amount applicable to the small portion of LV's New Jersey property not included in EL-LV." Comments of Government Parties on Erie Lackawanna's Response to the Court's Letter of September 4, 1981, at 12, Sp. Ct. Rep. at N 37063. LV contends there are figures in the record showing directly the taxes on the LV properties that were conveyed, LVR-Adik-1, App. A. This lists seven segments and states that "Apportioned NJ Taxes" totalled $232,101. Consequently, LV urges the added New Jersey taxes should be only $232,101-$175,000, or $57,101.

The difficulty with LV's contention is the lack of any explanation how the $232,101 figure was arrived at. In the absence of this we see no reason to depart from the figure reported in LV's 1973 Form R-1. It was LV's burden to show how much of this related to unconveyed properties; it did not discharge this.

THE GPS' PETITION

The GPs' Petition relates solely to our computation of LPCs for LV and AA.

A. *LPCs for the LV*

(1) *Day One Dismissals*

The first point raised by the GPs' petition related to the Court's calculation of the number of LV employees that would have been dismissed on "Day One"—the first day following disposition. The GPs contend that the Court inappropriately treated LV witness Grotz's estimate of the number of LV *employees* dismissed on Day One as if it represented the number of LV *positions*

5. LV points out that on this theory the correct figure should have been $413,000 rather than $403,000.

eliminated on Day One. Thus, the GPs conclude that the downward adjustment that the Court applied to Grotz's estimate in Table 37 to arrive at the number of "employees dismissed" was improper, because Grotz had already calculated "employees dismissed".

At several points the Opinion did distinguish between "employees dismissed" and "positions eliminated". This distinction was intended as a shorthand reference to the Court's application of pre-day one attrition, post-disposition attrition, and rehire rates. "Employees dismissed" was equivalent to "positions eliminated" following application of these factors. We find no indication in Grotz's testimony that he attached a similar meaning to the phrases, although we recognize that the Opinion at 153 can be read to the contrary.

Most important, however, is the fact that Grotz's estimate of employees dismissed on Day One did not reflect adjustments for pre-day one attrition, post-disposition attrition, or rehiring. Rather, his estimate reflected only adjustments for unprotected employees and employees over age 64. Grotz (S) (Oct. 15, 1980) at Table 1. Thus, although the GPs might disagree with our decision to account for pre-day one attrition or with the timing of post-disposition rehiring, our methodology did not, as the GPs' petition suggests, result in any double-counting of these factors.

Grotz's estimate that 389 LV employees would be dismissed on Day One was based upon his calculation that on Day One LV would have had 2,487 protected employees and only 2,098 positions available for these workers, Grotz (S) (Oct. 15, 1980) at Tables 1 & 2. Grotz did not adjust his estimate of the number of protected LV employees on Day One to reflect pre-day one attrition, *id.* at 13, a decision we did not accept, Opinion at 156. Our adjustment for pre-day one attrition, which had the effect of reducing the number of protected LV employees on Day One, therefore involved no double-counting and was entirely appropriate.

Grotz did attempt to reflect post-disposition attrition and rehiring of dismissed employees, Grotz (S) (Oct. 15, 1980) at 23-25 & Table 7, and adjusted his estimate of "employees dismissed" to reflect these factors, *id.* Although in calculating the LPCs of both EL and LV we accepted Grotz's general methodology, in both instances we treated the timing of attrition and rehires differently from the Grotz study, *e.g.*, Opinion at 153. As Tables 1-6 (regarding EL) and 34-37 (regarding LV) of the Opinion indicate, we computed dismissal allowances and lump sum payments on the basis of the number of employees eligible for benefits *at the end* of the period under consideration. We recognize that we could have treated the question differently. Indeed, we said in the Opinion at 120 that "any one of numerous methods of calculating LPCs could be adopted." We do not think our considered choice of the timing of post-disposition attrition and rehiring was improper. Our treatment of attrition and rehiring took a consistently conservative view with respect to the usefulness of attrition, Opinion at 125-26, 153-54, 163. The fact that one aspect of our methodology could have been made even less favorable to the Ts is no basis for rejecting the conclusions reached in the Opinion. Implicit in our acceptance of Grotz's methodology was our recognition that LV could have used attrition and rehiring to reduce its LPCs, and we think our treatment of the issue was appropriate.

(2) *Alleged Inconsistency Between Tables 36 and 43 for Period Ending 10/81*

The GPs' second claim is that in calculating the LPCs attributable to the relocation of LV employees we inadvertently substituted the figure 39 in the final line of Table 43 when we intended to use the figure 79 which appears in Table 36. As our footnote to Table 43 indicates, the figures that appear in that table are drawn from Table 40 as well as Table 36. The figure 39, which reflects the number of employees that would have been rehired in the period beginning 10/81, is derived from the column headed "10/81" in Table 40. That column indicates that, although 79

positions were available for surplussed employees, see Table 36, there were only 39 LV employees still receiving dismissal payments, and thus only 39 employees could have been rehired. Accordingly, we reject the GPs' contention.

(3) *Displacement Allowance*

We find more merit to the GPs' claim that the court's estimate of the cost of displacement allowances for LV employees was understated because of our reliance on the FSP and Grotz's testimony that Penn Central paid only $76.28 to each displaced employee. Grotz (S) (Oct. 15, 1980) at 30. The GPs point out that, while Grotz cited the $76.28 per employee figure, he actually used a $533.28 figure in his calculations of LV's LPCs. They further note that no expert used the $76.28 figure, which reflected costs being incurred five and six years after the PC merger. LV responds that the Court properly relied on PC's historical experience, and directs us to Shannon's testimony that displacement allowances would have been minimal.

We accept the GPs' point, both because we intended to accept Grotz's study on the issue, and because we think the $533.28 figure is far more reasonable than the other estimates in the record, such as Kasher's base figure of $2,717.04 per year. Kasher (S) (Nov. 1, 1979) at 32. As calculated by the GPs, this increases LV's LPCs attributable to displacement allowances from $19,757 to $138,120.

(4) *Timing Considerations*

The GPs attack our discounting LPCs to January 1, 1974, as inconsistent with our conclusion (Opinion at 196, see also pp. 131, 154-61, 261-62) that the sale of EL-LV to a solvent railroad would have occurred on April 1, 1976. They propose that LPCs be discounted only to the latter date. The court attempted (Opinion at 66) to determine what *rate* of discount a purchaser making its decision on January 1, 1974, would have applied to a

cash flow it would not have begun to receive until April 1, 1976; we did not make any calculations of what this would mean in terms of purchase price. We used the same discount rate in connection with LPCs but there we applied the discount to reduce the costs to January 1, 1974, dollars. Consistency between these two items and with our conclusions with respect to timing would seem to be achieved best by discounting both the earnings stream and the LPCs to April 1, 1976, the conveyance date. However, LV suggests (Answer, p. 7 n.3), and we agree, that this point is too important to decide without further briefing. This can be had at the conclusion of the nonrail use phase of the case if the parties have not yet reached a settlement. We therefore leave this point undecided.

B. *Ann Arbor*

The GPs contend that our reference to a figure of $1,190,000 on p. 167 was incorrect. This was a typographical error, but one which had no effect on our result. We in fact used Kasher's undiscounted figure of $1,374,000, reduced this to $687,000 because of income taxes, and discounted this to $493,200.

The GPs also make the same point concerning discounting AA's LPCs to January 1, 1974, which they have advanced in respect of LV. We make the same disposition of it.

Appendix I

The petitions for reconsideration are granted in part, and denied in part, and decision is reserved in part, as indicated in this opinion.

HENRY J. FRIENDLY

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

Roszel C. Thomsen
Judge

Dated: January 25, 1982

APPENDIX J

Appendix J

IN THE SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

FILED JUL. 12, 1983, JAMES F. DAVEY, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

Opinion on Valuation of the Central Railroad of New Jersey and the Lehigh & New England Railway for Nonrail Use

Before FRIENDLY, Presiding Judge, and WISDOM and THOMSEN, Judges.

Frazer C. Hilder, Cary W. Dickieson, Stephen C. Rogers, Howard M. Wilchins, Judith L. Walter, and Christopher J. O'Donnell, United States Railway Association, Washington, D.C.

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Appendix J

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Appendix J

PER CURIAM:

I.

INTRODUCTION

This opinion, which can be referred to as the CNJ Opinion, begins where our opinion reported at 531 F. Supp. 1191 (1981) ends. Familiarity with that opinion and our other major opinions, notably the *Constitutional Minimum Value (CMV) Opinion,* 445 F. Supp 994 (1977), is assumed. While our 1981 opinion is generally characterized by the parties as the *Rail Use Opinion* and this proceeding as relating to nonrail use, and we shall follow this method of description, it is not entirely accurate. The earlier opinion did deal in the main with the valuation of railroads or segments of railroads which had established earning power and would be continued in rail use on that account. Also, for reasons detailed primarily in Part III of the opinion, 531 F. Supp. at 1210-14, it announced certain conclusions with respect to railroads that would be continued in rail use despite lack of earning power or with earning power but without the prospect of competitive bidding. We deferred the valuation of such railroads to the second phase of the proceeding and referred to "the values that we will determine in the second phase of the proceeding simply as X." 531 F. Supp. at 1213. We also made a number of observations both in the *CMV Opinion* and in the *Rail Use Opinion* which bear upon the determination of X. Broadly speaking, we concluded that for all categories of rail lines, X was the value that could be obtained by sale for the next most valuable use, namely, a break-up of the railroad and a sale of its component parts. We shall call this scrap value, although recognizing that for certain categories of property, e.g., rail, the sale might be for continued use by another carrier in supplying rail service.

When we initiated this phase of the proceeding by our Sixth Pretrial Order of June 12, 1981, it appeared that, despite the earlier settlement by the Penn Central, a number of carriers

would be involved. However, as described in the *Rail Use Opinion,* 531 F. Supp. at 1204, we received, on August 5, 1981, an application from the GPs and the Reading Company for approval of a settlement of the claims of the Reading and five other companies for which it was (or expected soon to be) in a position to speak. Settlements were later approved with respect to all of the railroads that had been involved in these proceedings with the exception of the Central Railroad of New Jersey (now, as a result of reorganization, Central Jersey Industries, Inc.) (CNJ), including its interest in the assets of the Raritan River Railroad[1] and the Lehigh & New England Railway (L&NE).[2] We found that despite CNJ's lack of earning power, "in the absence of the Rail Act, New Jersey would have bought all of CNJ's conveyed properties", 531 F. Supp. at 1379. L&NE conceded that the Tamaqua branch would not have been sold for continued rail use, 531 F. Supp. at 1374. With respect to L&NE's Bethlehem branch, we found that while the Chessie, as an acquirer of the Reading's class (a) lines and of the Lehigh Valley, might have bid for this, there would have been no competitive bidding and that "the sales price would not have been significantly more than the applicable version of X", *Id.*[3]

Even with the scope of the proceeding thus reduced, a formidable record has been compiled. The statements of witnesses and appendices for the CNJ and L&NE comprise 5154 pages; those for the GPs 3368; and 17,435 pages of depositions were taken. The GPs' opening and reply briefs contain 786 pages; the CNJ's and L&NE's 741. Oral argument was heard on March 16 and 17, 1983.

The CNJ presented two theories of its case. Its preferred version was what it terms the "perception theory"—perhaps better described as the "constructive offer" theory. Under this theory CNJ endeavors to reconstruct what would have happened in the real world if the Rail Act had not been passed and its validity sustained, first by us in the *180 Day Appeals,* 384 F. Supp. 895

(1974) and later by the Supreme Court, *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), the former disagreeing with and the latter reversing *Connecticut Gen. Ins. Corp.* v. *United States Ry. Ass'n*, 383 F. Supp. 510 (E.D. Pa. 1974). Alternatively it submitted its own scrap value model, avowedly following the same principles as that of the GPs but unsurprisingly producing quite different results. The results of the models (in thousands) were:

CNJ perception theory	$72,886
CNJ perception theory as adjusted by GPs	$33,169
CNJ scrap value model	$82,441
GPs scrap value model	$22,932

We shall first analyze, and ultimately reject, CNJ's perception theory and then take up, category by category, the two scrap value models. While we shall not be able to arrive at an exact figure, we aim to express the governing considerations in sufficient detail that the parties should readily be able to agree on one, or, failing agreement, to submit figures carrying out our decision, with supporting memoranda.

II.

CNJ's Perception Theory

The takeoff point for CNJ's perception theory is the negotiations between Alan Sagner, Commissioner of Transportation for New Jersey's newly elected Governor, Brendan Byrne, and CNJ's Trustee and representatives of its security holders, in the spring and early summer of 1974, which are reviewed in the *Rail Use Opinion*, 531 F. Supp. at 1375-77. CNJ claimed that at a meeting with CNJ bondholder representatives on July 18, 1974, Sagner committed New Jersey to purchasing virtually all of CNJ's properties at a price equivalent to about $100 million for the conveyed properties, and that just compensation required CNJ to

be paid that amount.[4] CNJ's legal theory was apparently premised on the argument that "the Transferors' entitlement was to be measured by the indemnity required to compensate for the value of their lost opportunities", CNJ Opening Brief With Respect to Sales for Rail Use at 4, and that the frustration of the sale to which New Jersey had allegedly agreed was such a lost opportunity. We had no occasion to explore the legal validity of CNJ's theory since we concluded that the evidence did not support its contention "that an agreement had nearly been reached", 531 F. Supp. at 1378. One of the reasons sustaining our factual conclusion that no definite offer was in the immediate offing was Sagner's statement to a representative of the bondholders on July 30 that he had commissioned a further study by L.E. Peabody & Associates and that any proposals he would make would be based on that study, 531 F. Supp. at 1376.

With its argument based on a July 1974 "near agreement" thus having been rejected on the facts, CNJ here makes a similar argument on the basis that the evidence shows an agreement would have been reached in the fall of 1974. It contends that four studies in the State's possession, two of which—the Peabody study and the Hyde study—were commissioned by the State as a result of the discussions in July 1974, established a frame of reference that would have resulted, after further negotiations, in a purchase price in the neighborhood of $72,886,000 for the conveyed properties. This is put forward as a form of the "foreclosed option" principle, *see* 445 F. Supp. at 1012-13, which the GPs have recognized in other contexts. The argument is that but for the Rail Act and the court decisions sustaining it and holding it applicable to CNJ, Commissioner Sagner would have returned to the negotiating table and would have made an offer derived from the four studies, especially the two recent ones he had commissioned. Deprivation of the opportunity to accept such an offer would constitute on this view a taking of property compensable under the Fifth Amendment.

To analyze the argument a bit further, its premise is that if the State of New Jersey had made a firm offer to purchase the conveyed properties and this was rendered ineffectual by enactment of the Rail Act and the decisions upholding its validity and applicability to CNJ, foreclosure of CNJ's right to accept this offer would be a taking requiring payment of just compensation. The argument then proceeds from this premise to a conclusion that the same consequences should follow if the evidence shows with sufficient certainty that a firm offer of a fixed amount (or falling within an acceptably small range) would have been made but for the intervention of the Rail Act.

As indicated above, we previously found it unnecessary, *see* 531 F. Supp. at 1378, to consider the legal validity of the premise, namely, that frustration of a firm offer would be compensable, since we concluded that the necessary facts had not been established. The weight of authority is that offers to purchase property under condemnation are not even admissible,[5] much less determinative. However, the reasons expressed for this are singularly inapplicable to the kind of offer posited by CNJ. One is the danger of fabrication; however sound this may be with respect to oral offers, it would have scant applicability to a formal offer bearing the signature of the Governor or other authorized officer of New Jersey. Another argument, that the offer may have been made irresponsibly, without any real intention of consummation, is equally inapplicable to an offer of the sort described. A further objection, lack of knowledge by the offeror, is similarly inapplicable where a state which has been formally studying the question for months makes a firm offer. A final objection, made with respect to persons having the power to condemn, is that the offer may include a premium to avoid the expense of condemnation and the risk of an excessive award. This objection is removed when the court can determine, from the appraisals on which the offeror relied or from other circumstances, that no such element existed. Although it is unnecessary to decide the point, we thus do not readily dismiss the premise of CNJ's perception theory.

Movement from the case of an actual offer to one where none has been made is a quite different matter. The first issue is one of law. Has a condemnee been deprived of anything for which he is entitled to compensation because of having lost the opportunity to accept an offer which was not but rationally could have been made on the facts available at the time? We find it unnecessary to decide this beyond noting that an affirmative answer would open up possibilities for condemnees that are not to be contemplated lightly. Such considerations suggest that, even if we were to assume *arguendo* that the question should be answered in the affirmative, the proof that the offer would probably have been made and what it would have been must be clear and convincing. CNJ's perception theory shatters on this rock.

CNJ's evidence with respect to the probability and amount of the State's offer begins with Sagner's requests on July 26, 1974, for two independent valuations of CNJ which are referred to in the *Rail Use Opinion,* 531 F. Supp. at 1376, and which we shall now discuss in more detail. The first was by the firm of L.E. Peabody & Associates, which had long advised New Jersey on real estate matters. On July 26, 1974, Lee Peabody and William Whitehurst of that firm met with Commissioner Sagner. Lee Peabody later prepared a memorandum of the meeting. This recited that the Peabody firm was to determine the value of the CNJ on the bases of "book value, reproduction value, net liquidation value, and going concern value" and that in doing so it was to "use the Wyer Dick and DeLeuw Cather reports" described below. The Peabody report was submitted on September 23, 1974. While it reported values on the three other bases specified,[6] it concluded that the value most useful for negotiations with CNJ was net liquidation value. This it found to be $113 million as of December 31, 1973, which "should be discounted 20 percent to reflect the elimination of future uncertainties and risks resulting in a value of $90 million." In arriving at this figure the Peabody firm relied heavily on a study of the net liquidation value (NLV) of all of CNJ's assets as of June 30, 1968, made pursuant

to Orders 101 and 137 of the CNJ reorganization court by Wyer, Dick & Co. and completed June 12, 1970. This had relied for real estate values on a report made by the firm of Van Horn & Dolan, which had assisted CNJ in regard to real estate matters for many years.

The second study was by James V. Hyde, Jr., Director of the Right-of-Way Division of the New Jersey Department of Transportation. As reflected in a memorandum dated July 24, 1974, the Division was asked to submit within 60 days reports on the value of the CNJ (excluding rolling stock) as an operating railroad in use and at liquidation or net salvage value. The report, consisting of three volumes, estimated the liquidation value of the CNJ's land and trackage at $121,005,000, as of October 1974.

The Wyer Dick study had shown a NLV of $79,654,000 as of June 30, 1968. Shortly after its preparation, New Jersey retained DeLeuw, Cather & Co., which was later to make many studies for the GPs in connection with these proceedings to review the Wyer Dick study and "to express opinions on the methods and procedures used . . . and on the accuracy of the values presented therein." DeLeuw Cather Study, 1 CNJ App. at 80. DeLeuw Cather, with the approval of the State, retained the New Jersey real estate firm of Stack & Stack to review the estimated values of land contained in the Wyer Dick study. Agreeing with some of Wyer Dick's conclusions, and believing others to be too favorable but more to be too unfavorable to CNJ, it concluded that the net liquidation value of the CNJ as of June 30, 1968, was approximately 15% greater than Wyer Dick's estimates, or, in other words, $91 million. Particularly DeLeuw Cather regarded Wyer Dick's real estate values as too low.

At the trial CNJ undertook to distill from the four studies what New Jersey would have thought the NLV of the conveyed properties would be. It did this through two witnesses, John Van Horn, a real estate expert of long experience who, as stated, had been involved in the Wyer Dick study, with respect to real estate, and Jack Storm, who was Director of Engineering for Snavely, King

& Associates, Transportation and Economic Consultants, with respect to other assets. The problems faced by these witnesses were formidable. All the appraisals had dealt with the totality of CNJ's assets. Some of these assets had been disposed of before enactment of the Rail Act and not all of the remainder were designated for conveyance. Other categories had increased in quantity between December 31, 1973 and the conveyance date, April 1, 1976. The methodologies of the studies differed with respect to many important matters. Some discounted the assumed proceeds of sale to present value; others did not. The Peabody study simply trended Wyer Dick's real estate values upward; Hyde made an independent appraisal. The Hyde study made a deduction for title defects; the Peabody study did not. Despite all these problems, Storm felt able to conclude that New Jersey would have perceived the NLV of the conveyed properties in 1974 to be $69,472,000 on the basis of the Peabody study and $72,886,000 on the basis of the Hyde study. As indicated, CNJ urges the $72,886,000 figure, primarily on the basis that Hyde made an independent appraisal of the real estate, whereas Peabody had simply trended Wyer Dick's real estate values which DeLeuw Cather had considered too low.[7] The GPs, while challenging the whole concept of the perception case on both legal and factual grounds, retort that if proper adjustments were made, New Jersey's 1974 perception would have been only $33,169,000.

The GPs mount their factual attack on a broad front. They emphasize that neither Storm nor Van Horn purported to testify what New Jersey in fact perceived; their testimony was limited rather to how Peabody and Hyde would have perceived the value of the assets conveyed on April 1, 1976, and, inferentially, how the State should have perceived this on the basis of their appraisals. They emphasize CNJ's failure to call any New Jersey officials as witnesses. The GPs called Whitehurst to testify that the Peabody study was designed simply to meet Commissioner Sagner's request for a "rough cut" and to supply a "rank order" of alternatives. CNJ answers that nothing in the letter transmitting

the Peabody report suggests that it was a "rough cut" and that the authors of the study knew that negotiations would proceed on the basis of NLV and the other figures were included for cosmetic purposes, such as showing that a purchase at net liquidation value would be a good deal for the State. Whitehurst also pointed out a number of serious defects in his firm's study, such as the lack of an independent real estate appraisal, failure to consider the timing of the liquidation process, failure to discount proceeds to be received over a term of years to present value, and failure to take account of potential glut. CNJ responds that this poor mouthing of the report ill comports with what the Peabody firm said at the time and also that if there are defects, these can be rectified by resort to the other studies, particularly the Hyde Study. Whitehurst concluded that he "would not have advised the State of New Jersey to proceed to set a purchase price on the basis of [the] figure" set forth in his firm's report. Whitehurst Testimony, June 2, 1982, at 7. CNJ answers that this is exactly what the report purported to do, indeed, that what Commissioner Sagner wanted was a floor since he expected CNJ's zealous Trustee, R.D. Timpany, to press for more.[8] CNJ calls attention to a memorandum prepared by New Jersey state officials of a meeting with federal officials in Washington on August 23, 1974, in which Sagner stated that he expected the Peabody report to place a net liquidation value of $70 to $80 million on CNJ's rail properties. The GPs did not call Hyde but relied on an affidavit in which he said that his study was "a preliminary planning study related solely to the transportation activities of the Department of Transportation", which it manifestly was not, and that it "had nothing to do with the acquisition of land through condemnation." CNJ objects to this affidavit as inadmissible hearsay, as it well may be. In any event, while the statement that the report "had nothing to do with the acquisition of land *through condemnation*" (emphasis supplied) is literally correct, the letter transmitting the report clearly stated that it was an estimate of the liquidation value and also that "the equitable

true market value of the present system lies between the Liquidation Value and the Value-in-Use." More impressive are the GPs' attacks on the Hyde Study, pointing out the use of all sales in the area rather than sales of comparable properties to value real estate, the admitted failure to allow for title defects, and the wide disparity between Hyde's estimate of the values of two parcels retained by CNJ under the Final System Plan and what was actually paid for them by the State.

We are left with two conflicting impressions. One is that, on the basis of the appraisals, Sagner would have returned to the bargaining table with an offer which exceeded not only the GPs' presently asserted scrap value figure but the higher scrap value figure we have found. For one reason or another the minds of all concerned in 1974 were attuned to a higher scale. There is, for example, no evidence that in 1974 New Jersey entertained such ideas as that all of CNJ's ties and much of its rail was valueless, largely because of glut, although perhaps it ought to have done so. The other impression is that we have no sufficient basis for finding what New Jersey's offer would have been. For one reason, neither the Peabody report nor the Hyde report gave any satisfactory notion of the liquidation value of CNJ's real estate,[9] as CNJ's expert Van Horn conceded. We cannot assume that the State would have entered into serious negotiations when one of its figures with respect to such a major item was more than 150% of the other. Perhaps there might have been a split-the-difference approach, perhaps New Jersey would have commissioned a new appraisal of the real estate, perhaps something else would have occurred—we simply do not know. While it "has been obvious . . . from the beginning . . . that no amount of effort by counsel and the court will produce a mathematically precise figure of what the estates are constitutionally entitled to receive and the Government is required to pay" and that "the best for which anyone can hope is a fair approximation", *Compensable Unconstitutional Erosion (CUE) Opinion,* 439 F. Supp. 1351, 1390 (1977), we cannot properly award judgment on the basis of mere

speculation. CNJ has simply not met its burden of showing by clear and convincing evidence that, after the Peabody and Hyde appraisals were available, New Jersey would have made an offer at any ascertainable figure, and we therefore need not discuss what the result should be if CNJ had carried its burden on the facts.

III.

REAL ESTATE

A. *Base Value*$_{10}$

The parties stipulated to real estate base values in all counties except three. With regard to the real estate in Essex, Hudson, and Union Counties, the parties arrived at widely divergent base values. CNJ conveyed approximately 940 acres in those three counties to Conrail. CNJ assigns a base value of $33.4 million to the conveyed real estate in the three counties, while the GPs have adopted a $17.6 million figure.

CNJ and the GPs have used a market data approach to arrive at their estimates. Under this approach, an appraiser attempts to determine the value of the property at issue by inspecting or otherwise determining the characteristics of the parcel of property. The appraiser then examines sales of similar property to come up with the "going rate" for property in the area. CNJ refers to the resulting figure as the "typical property value"; the GPs refer to the result as the "across the fence value". Although some underlying assumptions differ, the two terms describe the same basic appraisal methodology.[11] *See* Hannoch/Heaney Deposition, January 11, 1982, at 30-31, 2 CNJ App. at 136-37. By adjusting the comparable sales figures to take into account the peculiar characteristics of the subject property and any change in price levels or other circumstances warranting adjustment between the date of the comparable sale and the valuation date, the appraiser hopes to arrive at an accurate estimate of the property's value.

Appendix J

As the use of the term "comparable sales" indicates, the market data approach necessarily involves many subjective judgments on the part of the appraisers. The parties spend many pages in their briefs singing the praises of their own appraisers and attacking the credentials and objectivity of the appraisers who worked for the other side. Because we find fundamental flaws in the assumptions underlying the estimates of both CNJ and the GPs, we do not fully accept either party's estimate of real estate base value.

1. *CNJ Appraisal*

In conducting their studies, the CNJ appraisers, Franklin Hannoch, Jr., and Michael J. Heaney, employed two assumptions that detract significantly from the reliability of their estimates. The first invalid assumption involves the availability of continued rail service to CNJ's conveyed parcels. The parties do not dispute that if a piece of industrial real estate has access to a rail line it is worth more to a potential buyer than one not having such access. The parties did not agree, however, on whether particular parcels would continue to be served by a rail line after the conveyance of the property to Conrail. CNJ's appraisers assumed that all CNJ real estate would continue to be served by a rail line if the purchaser so desired. CNJ contends that this assumption is necessary to vitiate the unfairness that would result if the government forced CNJ to convey property for the formation of a railroad and then valued the property as if the railroad did not exist. Hannoch/Heaney Deposition, March 24, 1982, at 782, 33 GPs Supp. App. at 228.

CNJ's argument overlooks the fact that, in the conceded absence of proof that the property in question had earning power that would make it valuable for rail use, it is entitled to compensation based on the property's nonrail use value. *See* Sixth Pretrial Order, Sp. Ct. Rptr. N-35965, at ¶ 1. By assuming continued rail service to all conveyed parcels, CNJ would have us value its property as if the CNJ would continue as a functioning unit,

whereas the assumption underlying the nonrail use approach is precisely the contrary.

Our holding does not suggest, however, that none of the CNJ property would ever be served by a rail line. Many parcels are close enough to other northeastern rail lines for the construction of a spur to service the property that would be both economically feasible and desirable. *See* Peabody Study, Analysis of CNJ Freight Traffic by Line Segment, September 19, 1974, at 77-107, 1 CNJ App. at 307-37;[12] *cf. New Haven Inclusion Cases,* 399 U.S. 392, 453-57 (1970).

Unfortunately, we are unable to adjust the CNJ figures to reflect continued rail service to some, but not all, parcels. The CNJ appraisers did not consider the rail service potential of individual parcels. They uniformly assumed that each parcel would have continued rail service. Hannoch/Heaney Deposition, March 24, 1982, at 782, 33 GPs Supp. App. at 228. Furthermore, Hannoch and Heaney admitted that the continued rail service assumption had played an important part in their valuations, but they were unable to estimate how much their real estate estimates would decrease in the absence of the continued rail service assumption. *See* Hannoch/Heaney Deposition, March 24, 1982, at 741-48, 2 CNJ App. at 311-16.

The other faulty assumption on which Hannoch and Heaney relied relates to topography. A substantial portion of the property in question is old CNJ rights of way. Much of this property contains embankments or depressions constructed to maintain even track levels. The embankments mainly consist of ballast and fill materials. The parties assumed for appraisal purposes that the rights of way would have been stripped of rail, ties, and ballast before sale. The CNJ appraisers went one step further and assumed that, with respect to embankments, the land would be returned to its original contours prior to sale.[13] This assumption was based on the premise that fill materials could be sold on site for a price greater than the cost of removal.[14]

Even if we were willing to assume that fill could be sold, we are unwilling to conclude that the presence of embankments should be ignored in estimating the value of the parcels on which the embankments stand. If a market existed for fill, CNJ still should have considered the side effects of removal. For instance, the CNJ appraisers should have taken into account the difficulty of removing fill from remote, narrow rights of way and the ecological impact of heavy earth-moving machinery on adjacent land.

Removal of all embankments also would be an extremely time-consuming endeavor. Fill could be sold only as a need for it arose in the marketplace. Because removal of all embankments would involve disposal of more than 6.4 million cubic yards of fill, we assume that the market would not absorb the supply of fill within a short period of time.[15] As a result, sale of those parcels containing embankments would be delayed pending the sale of the fill. This delay would translate into lower present values for the proceeds from the sale of those parcels.

Furthermore, removal of fill might hinder the sale of parcels not containing embankments. A buyer might be hesitant to purchase a segment of right of way if he anticipated use of his property by CNJ as a means of access to a parcel from which fill was to be removed. Taken as a whole, these factors indicate that the CNJ's appraisers incorrectly ignored the effect that embankments would have on base values of real estate.[16]

CNJ's misconceptions with regard to topography and continued rail service signify that its methodology in arriving at real estate values is fundamentally flawed. Hannoch and Heaney admitted that their assumption of continued rail service was an integral factor in their valuation. Hannoch/Heaney Deposition, March 24, 1982, at 772-73, 38 GPs Supp. App. at 200-01. We have stated that we are unable to adjust their figures to take into account any rail service that would have been available. CNJ's erroneous assumption that all real estate with embankments would be restored to its original contours has an equally unquantifiable effect on the CNJ estimates.[17] In short, Hannoch and

Heaney have cast substantial doubt on the accuracy of their appraisals by basing their work, in part, on two incorrect assumptions.

2. *GPs Appraisal*

Unfortunately, the GPs' valuations suffer from some severe inadequacies as well. One such inadequacy involves continued rail service. As we pointed out in our discussion of CNJ's continued rail service assumption, some parcels might have had continued rail service from other nearby rail lines. *See* Peabody Study, Analysis of CNJ Freight Traffic by Line Segment, September 19, 1974, at 77-107, 1 CNJ App. at 307-37.[18] Nevertheless, the GPs instructed their appraisers to assume that none of the parcels would be serviced by rail. GPs Opening Brief at D-9. Just as the CNJ appraisers were too liberal in assuming rail service to all parcels, the GPs were too conservative in assuming no rail service. The proper approach would have been to determine the accessibility of each parcel from rail lines that would have been proffered for continued service after April 1, 1976, and would have met the tests laid down in our *Rail Use Opinion.*

Another shortcoming of the GPs' studies involves the GPs' choice of comparable sales figures. The GPs instructed their appraisers to consider only sales occurring before April 1, 1976 in arriving at their "across the fence" values. In many cases, sales of property similar to that which was being appraised occurred after April 1. In some cases, Conrail sold the very parcels under examination.[19] The CNJ appraisers testified that they considered all comparable sales in arriving at their figures. *See* Hannoch/Heaney Deposition, January 11, 1982, at 31-32, 2 CNJ App. at 137-38.

The GPs argue that post-April 1 sales should not be considered because they may distort the value assigned to a parcel of real estate. The GPs contend that a purchaser who buys property after the valuation date has at his disposal information not available on or before the valuation date. The price paid for similar

property after the valuation date, therefore, does not accurately reflect the economic environment on that date.[20]

We find the GPs' reasoning unpersuasive. Although a post-April 1 buyer might have more information at his disposal than a hypothetical buyer as of the valuation date, a buyer of comparable property before April 1 would have less information than the hypothetical buyer. Therefore, we see no reason to assume that pre-valuation date sales have any more merit for establishing the market value of the subject property than post-valuation date sales, unless the latter have been influenced by the condemnation of the subject property. We find that the GPs' appraisers should have considered post-April 1 comparable sales in determining the NLV of CNJ's conveyed real estate.

Just as we find it impossible to rectify the effect of CNJ's erroneous assumptions on its estimate of base value, we cannot quantify the effect that the GPs' misguided instructions had on their real estate valuations. Referring to the issue of continued rail service, counsel for the GPs stated at oral argument, "unquestionably, it has a very significant impact". Transcript at 153. The GPs' opening brief states that the assumption of continued rail service is "a major reason why the base values presented by Messrs. Hannoch and Heaney are so much higher than those of the Government Parties". GPs Opening Brief at D-51.

In a similar vein, the GPs did not indicate how much real estate values would have changed had they considered post-April 1, 1976 sales data. The evidence indicates, however, that the CNJ appraisers relied heavily on post-April 1 sales and that the GPs appraisers had available to them many post-April 1 comparable sales with which they could have worked.[21] The net effect of these two errors in the GPs' appraisal methodology is to undermine the credibility of the GPs' real estate values. We therefore cannot adopt the GPs' estimate of $17.6 million as the base value of conveyed real estate in the disputed counties.

3. *Van Horn Appraisal*

Although we find fundamental flaws in the real estate estimates propounded by both sides, we believe that there is an equitable means of arriving at more accurate real estate base values. The evidence indicates that Hannoch and Heaney relied to a great extent on information provided by the appraisal firm of Van Horn & Dolan. From the 1950's until 1978 the Van Horn firm, principally under the supervision of John Van Horn, performed a number of appraisals for CNJ. In 1969-70, Van Horn appraised several individual parcels of CNJ real estate and served as project manager for a complete appraisal of all CNJ's real estate valued as of June 30, 1968. In 1974 and 1975, he supervised another complete appraisal of all CNJ real estate.

Van Horn's association with CNJ did not end with the conveyance of most of CNJ's property to Conrail. Since April 1, 1976, Van Horn (and his firm) has acted as consultant and manager of CNJ's retained real estate, and has performed some services with regard to conveyed real estate. These services have included the preparation of a land inventory and maps of CNJ's conveyed property in late 1977 and early 1978.

Between August 1978 and the end of the year, in response to a request from CNJ's counsel, Van Horn updated his previous work to arrive at a nonrail use value for CNJ's conveyed property as of April 1, 1976. CNJ did not use Van Horn's appraisal as evidence of real estate base values. Instead, it commissioned Hannoch and Heaney in July 1981 to perform new appraisals. Van Horn furnished Hannoch and Heaney with work papers containing sales and other component data and maps accumulated by his firm.[22] CNJ has not given any explanation for its decision to change appraisers.

Three aspects of the 1978 Van Horn appraisal recommend it to us, other than Van Horn's long-standing familiarity with CNJ property. First, Van Horn made no artificial assumptions, such as the blanket presence or absence of continued rail service,

regarding access to the conveyed property.[23] Van Horn did not assume that the real estate would be returned to its original contours.[24] Finally, Van Horn considered some post-April 1, 1976 sales in arriving at his estimates.[25]

CNJ has long maintained that the Van Horn estimates are unreliable indications of the base value of its conveyed real estate.[26] In its attemp to deny the GPs access to most of Van Horn's study, CNJ referred to Van Horn's study as a "false start" appraisal. CNJ argued that the Van Horn appraisal was hastily performed as a means of arriving at preliminary estimates of real estate values rather then final figures. CNJ contended that Van Horn designed his 1978 update of previous appraisals only to give CNJ's counsel a general indication of the value of conveyed real estate. *See* Objections of Central Jersey Industries, Inc., and Brief in Support Thereof, to Government Parties [sic] Motion of January 19, 1982, to Compel Production of Certain Documents, January 25, 1982, at 5. Although CNJ's brief does not set forth its objections to the use of Van Horn's figures, we assume that CNJ still harbors the concerns stated in its January 25, 1982, memorandum.

CNJ's argument not only ignores the fact that Van Horn's past experience with CNJ's property qualified him to perform such an appraisal, but also that Hannoch's and Heaney's work relied heavily on Van Horn's data. Moreover, Van Horn spent five months updating figures he had compiled over a period of several years. By comparison, Hannoch and Heaney conducted their entire appraisal in about four months.

Another factor that recommends the Van Horn figures as accurate reflections of the base values of the CNJ real estate is that the GPs have recognized the Van Horn study as having been based on more acceptable assumptions than the Hannoch and Heaney study. During oral argument, the GPs stated that one way to quantify the effect that the CNJ's continued rail service and topographical assumptions had on the Hannoch and Heaney figures is to compare them with those of Van Horn because the

Van Horn study did not make the same misguided assumptions. Transcript at 255. Furthermore, the GPs imply in their brief that they felt that Van Horn was much more qualified to appraise the CNJ property than Hannoch and Heaney. *See* GPs Opening Brief at D-41 to 45.

We find that Van Horn's 1978 estimate of the base value of CNJ's real estate in the three disputed counties is the most accurate indication of that property's value. Van Horn was familiar with the property and had appraised the property on several occasions in the past. If he made mistakes with regard to the physical attributes of that property, those mistakes probably infected Hannoch and Heaney's appraisal as well, because of their reliance on the Van Horn work papers. The assumptions used by Van Horn in conducting his study were superior to those used by both the CNJ and GPs appraisers. Finally, the GPs have implicitly recognized that the Van Horn figures have, at least, some validity. We find the base values in the disputed counties to be:

Essex	$ 3,279,800
Hudson	2,653,700
Union	
Elizabethport	10,162,700
Other	8,369,000
Total	$ 24,465,200

B. *Adjustments to Base Value*

1. *Title Defects*

The GPs contend that the base value of CNJ's conveyed real estate must be reduced to eliminate the base values of conveyed parcels for which CNJ would not have had marketable title in a nonrail use liquidation of the real estate.[27] The GPs would also deduct the cost, including the cost associated with the delay in receiving proceeds from sales, of bringing quiet title actions for

parcels, title to which would be defective but curable. To estimate these adjustments for title defects, the GPs introduced testimony of Paul E. Lacouture, an attorney of considerable experience in real estate titles. He reviewed 102 valuation maps of CNJ conveyed property, representing over 90% of the base value appraised by the GPs, as well as title deeds and other documents in the possession of Conrail.

Lacouture found that CNJ, in assembling its original rights of way more than a century ago, acquired many easements, licenses, and determinable and conditional fees subject to reversion upon cessation of rail use. For all such rights of way, Lacouture concluded that CNJ would have had no title to transfer in a nonrail use liquidation and, thus, this property should be assigned no value.[28] Also CNJ had terminable or limited interests in land in some cases raising title problems which could be cured by quiet title actions. John H. McDermitt, an attorney with thirty years' experience in New Jersey title litigation, testified that quiet title actions for curable defects could be successfully completed in an average of twenty-three months at an average cost of $5,258. Combining the elimination of sale proceeds where title defects were insurmountable and the cost of cure and delay in receipt of proceeds for lesser defects, Lacouture concluded that CNJ's real estate base value should be reduced by 7.187%.

CNJ's principal argument in opposition to a deduction for title defects is that unless reversion of title to any such parcel was imminent as of the valuation date, CNJ as the holder of a defeasible interest in the parcels was entitled to compensation for their full value. The great majority of the title defects uncovered by Lacouture were reversionary interests taking effect on cessation of rail use. CNJ argues that cessation of rail use on the conveyed properties in the absence of the Rail Act was never contemplated and thus that injustice would result if we were to carry our assumption of a nonrail use liquidation to its logical conclusion of divesting CNJ of title to real estate that would in fact never have gone out of rail use. The authorities cited by CNJ support the

proposition that where, as a consequence of a condemnation proceeding, a defeasible interest that would otherwise have subsisted indefinitely is extinguished, the holder of the defeasible interest is entitled to compensation as if possessed of an estate in fee simple absolute, *Terminal Coal Co.* v. *United States,* 172 F.2d 113, 116 n.5 (3d Cir. 1949); *United States* v. *635.76 Acres of Land,* 319 F. Supp. 763, 767 (W.D. Ark. 1970), *aff'd.,* 447 F. 2d 1405 (8th Cir. 1971) (per curiam); Restatement of the Law of Property § 53, comment b (1936). The authorities, however, are not apposite since the condition of indefinite subsistence apart from the condemnation is not met. The only prospect of continued rail use of CNJ's lines lay in condemnation by or sale in lieu of condemnation to the federal government or New Jersey. Thus reversion of title was neither remote nor speculative: it was imminent unless there was intervention by some authority with eminent domain power and willingness to carry on a losing operation. Where, but for the action of a condemnor, the condemnee's determinable or conditional title to real estate would most likely be lost in the near future, no compensation is required. We therefore eliminate the base values of those portions of CNJ's real estate which would have reverted upon cessation of rail use.[29]

CNJ further argues that the GPs' deductions, if permissible, are greatly overstated. Its appraisers testified that less than 3% of the conveyed acreage was subject to title defects, but gave no estimate of the value of this real estate. CNJ also introduced a letter from a New Jersey title insurer who reviewed 10 "representative" title deeds and opined that those merely imposing "restrictions" that parcels be used for railroad purposes and those reserving to grantors a right of reentry might under certain conditions be insurable.[30] While we recognize that the successors in interest of the original grantors may well have disappeared in the intervening century, this does not justify an award to CNJ on the basis of marketable title where it has no title or would have to incur the costs and delay incident to a quiet title action prior to any sale—even though the result is that the GPs will be paying no

compensation for certain property that Conrail is using. CNJ did point out, and the GPs conceded, an error of $6,240 in Lacouture's deduction from the GPs' base values. To reflect this correction we will make an adjusted deduction of 7.162% from base value for title defects.[31]

2. *Selling Costs*

Apart from its general objections to the deduction of selling costs, which we reject in Section VI.B. under the heading "Liquidation Organization and Disposition Costs", CNJ argues that in the ordinary condemnation proceeding employing the "comparable sales" approach with respect to real estate, no deduction for the costs of selling a parcel of real estate would be made. *See, e.g., State* v. *Brooks,* 152 So.2d 637, 641 (La. App. 1963). However, the GPs insist that where, as here, the sale is of a large tract which must be broken into parcels, the costs of sale must be deducted. We need not encumber this opinion with citation of the GPs' many authorities, since the Supreme Court's opinion in *New Haven Inclusion Cases, supra,* 399 U.S. at 436-37, is ample precedent for the deduction of holding and selling costs when railroad property is to be divided and sold over a long period of time.

The GPs estimate the deduction at $3,002,000 as against a base value of $25,166,500. CNJ's figure is only $190,000 as against a base value of $40,093,770. The enormous difference comes from two factors: CNJ contends that the organization it was obliged to retain to sell its non-conveyed properties could have done much of the work incident to the sale of the conveyed properties at no additional expense. It contends also that its own experience in selling its retained real estate indicates that the GPs' estimated selling costs are much too high. We deal with these contentions under the following categories:

(a) Cost of Sales Force.

(b) In-House Disposition Costs.

(c) Surveys, Transfer Taxes, and Attorneys' Fees.

Appendix J

(a) *Cost of Sales Force.* The GPs introduced testimony of Arnold S. Tesh, USRA's Director of Real Estate. Tesh concluded that the most effective method of disposition of CNJ's developable properties would be to supplement CNJ's in-house sales force with a central marketing agent who would develop overall plans and contact and supervise real estate brokers. Tesh thought that the fees of the central marketing agent, including brokers' commissions, together with the expense of the in-house staff would amount to 10% of the gross sale proceeds. Testimony of Eastdil Realty Inc. supported Tesh's 10% estimate for developable properties. This figure is in line with estimates of selling costs in the 1968 Wyer Dick study (up to 10%),[32] the 1974 Peabody study (12½%, including other closing costs), and the 1974 Hyde study (10%). Tesh further testified that sale of abutter properties would have been more difficult, requiring 15% of gross proceeds to compensate independent local brokers and a limited in-house sales force. Sales expenses set any lower than this, Tesh believed, would lead to a slower pace of sale and, with the effect of discounting, would result in a lower figure for net proceeds.

We are not persuaded that a figure higher than 10% is warranted for the sale of abutter properties. Perhaps, as the GPs contend, a broker must be more persistent in his efforts to persuade an abutting owner to buy and would demand higher commissions since the amount of each sale is relatively small. At the same time the broker expends no effort or advertising expense in locating his prospective buyer, and this would work the other way. Furthermore, as Tesh conceded, a larger proportion of sales of abutter properties would be made by CNJ's in-house staff. We conclude that no sales force expense greater than 10% should be deducted for any of CNJ's conveyed real estate.

CNJ would have us further reduce the rate of selling expenses in the light of its own experience in selling well over half of its 2000 acres of retained real estate. From April 1, 1976, to the end of 1981, according to testimony of John Van Horn, CNJ received

nearly $21 million in proceeds of real estate dispositions of retained properties while incurring no in-house expenses and only $455,000 (or 2.17% of gross proceeds) in fees and commissions paid to the firm of Van Horn & Dolan. However, more than $17 million of these proceeds derived from two condemnations by the State of New Jersey (one still in litigation) and a sale to the Port Authority of New York and New Jersey, transactions which the GPs argue are "not representative". In sales to private purchasers, Van Horn's commissions ranged from 6% to 10%, a range that Van Horn testified to be "typical" in sales of vacant land in New Jersey. Lower commissions were incurred with respect to the more expensive properties. While CNJ's experience in disposing of its retained real estate is impressive, this is another instance where CNJ has failed to provide us with an alternative figure to substitute for that supplied by the GPs. CNJ has not shown what proportion of its conveyed properties would, upon liquidation in the absence of the Rail Act, have been condemned by public authorities at little or no selling expense, or how much or how little litigation expense would have been incurred. Without an informed estimate from CNJ, we apply the figure of 10% as the best available calculation of the expense attributable to brokers' commissions, marketing agents' fees, and salaries of in-house sales personnel.

(b) *Post-1977 In-House Disposition Costs.* The GPs would have us deduct $3.7 million in "additional management costs" that they estimate would be incurred in completing "the disposition of CNJ's conveyed real estate" in the fourteen years after May 31, 1977, the date by which all facilities and equipment would have been sold. GPs Opening Brief O-19. Discounted to present value, this deduction would amount to about $2.5 million as of April 1, 1976. Testimony of Russell F. Murphy, a consultant and former USRA Director of Financial Analysis, reveals that this deduction reflects the estimated cost of legal, accounting, finance, and personnel departments attributable to CNJ's

conveyed real estate after May, 1977, Murphy Testimony, February 16, 1982, at 24, but does not include expenses of the Trustee and his staff, an item for which the GPs concede no deduction should be made, *id.* at 46b n.3. In setting this amount Murphy sought to avoid duplicating Tesh's calculation of the salaries and expenses of an in-house staff assisting in the sale of real estate included in his deduction of 10% from the proceeds of developable properties and 15% from those of abutter properties. Still, his result is a top-heavy setup of four management departments, in addition to the Trustee and his staff, lingering on for fourteen years to supervise a limited number of in-house personnel charged with assisting CNJ's marketing agent and independent brokers in disposing of a dwindling supply of real estate. We conclude in Section III.B.3, *infra*, that 55% of the real estate would have been sold in the first two years, 85% by the end of the fifth year, and the rest by the end of the eighth year of disposition. We are convinced that ample provision has been made by Tesh for all in-house expenses that would have been incurred by CNJ in disposing of the small balance of its conveyed real estate remaining after the fifth year. The few remaining in-house personnel could surely have reported directly to the Trustee, and their compensation could have been handled by his staff. Murphy's additional deduction for "management costs" through the fifth year is considered and substantially reduced in the portion of the opinion dealing with liquidation organization and disposition costs. All such costs after the fifth year are disallowed.

(c) *Surveys, Transfer Taxes, and Attorneys' Fees.* On behalf of the GPs, Tesh estimated that an additional 2% should be deducted from gross real estate proceeds to account for "the seller's customary share of closing costs, such as transfer . . . taxes and closing attorney's fees, as well as the costs of performing surveys, as necessary". Tesh Testimony, February 16, 1982, at 18. CNJ reports that in selling almost $21 million worth of retained real estate it has expended only $140,000 (or about 0.7%

of total proceeds) in legal costs, exclusive of a pending condemnation case,[33] nothing for surveys or title searches, and nothing for transfer taxes. CNJ argues that surveys, like title searches, are ordinarily paid for by the buyer in the New Jersey real estate market, and that transfers by a bankruptcy Trustee are exempt from the 0.35% New Jersey transfer tax. Tesh admitted in deposition that he had assumed CNJ was not in bankruptcy and hence was liable to pay the transfer tax. 2 CNJ App. at 1641. It seems more likely that CNJ would have been in reorganization at the relevant time, and thus would qualify for the exemption granted to transfers by "a receiver, trustee in bankruptcy or liquidation, or assignee for the benefit of creditors" in N.J.S.A. 46:15-10(g) (1982). We find therefore that no transfer taxes would have been incurred, that some of the cost of surveys would have been reimbursed by buyers, that closing attorneys' fees would have been incurred, and that legal fees would have been incurred in connection with condemnation, for a combined deduction of 1% of gross proceeds.

3. *Discount to Present Value*

We here discuss whether the proceeds of CNJ's real estate estimated to be realized after April 1, 1976, should be discounted to their value as of that date, and, if so, by how much.[34] We shall do this under three principal subheads:

(a) Should there be such a discount as a matter of principle?

(b) If so, when and in what amounts would the proceeds of the sale of real estate have been realized?

(c) If so, to what extent is the amount otherwise deductible in order to arrive at the present value of future proceeds offset by appreciation from the appraised values as of April 1, 1976?

We shall also deal briefly with related matters such as real estate taxes, other holding costs and interim income during the holding period.

(a) *The Need to Discount.* Admittedly, the normal method of finding the market value of a parcel of real estate being condemned is to determine its "market value" on the date of taking, usually on the basis of extrapolation from sales of comparable parcels. No discount is taken for the fact that in the real world the owner will often spend some months finding buyers and negotiating the best price even if only one parcel is being sold. The typical appraisal methodology avoids discounting by simply assuming that a willing buyer is available as of the date of the condemnation. The cases do not explain why such an assumption is made. Perhaps the matter is regarded as *de minimis*, since the prospective condemnee would often have started his hypothetical quest for purchasers and begun negotiations with them before the actual taking and sale could have occurred almost immediately thereafter. Perhaps the thought is that prediction of the actual sale date for a single parcel is beyond the scope of reasonable estimate. Perhaps it is deemed unfair that an often unwilling condemnee should be penalized for the time it would have taken him to find a purchaser. In any event we have been cited to no instances in which a court has considered the application of a discount in cases of this sort.

Here all parties concede that CNJ could not have sold the more than 3000 acres of its conveyed real estate as one parcel except perhaps to a wholesaler who would have broken up the tract into parcels, such as the bulk buyer hypothesized by the I.C.C. in the remand in the *New Haven Inclusion Cases, supra,* 334 I.C.C. at 60-61; 399 U.S. at 468-73.[35] The GPs contend the real estate would have been sold as 364 parcels; CNJ estimates it would have been sold as 962. Both sides agree that the process would have consumed some years, and the GPs argue that the normal implicit assumption of a willing buyer in existence as of the condemnation

date is inapplicable. The GPs contend that under such circumstances the proper course is to estimate the amount of sales in each year, add interim income and appreciation if any to the estimated date of sale, deduct taxes, other holding expenses, and selling costs to the same date, and then discount the result to value as of April 1, 1976.

This seems indeed to be the accepted method of appraisal in the case of large tracts of raw land which are proposed to be subdivided and sold. *See United States* v. *Iriarte,* 166 F.2d 800, 804 (1st Cir.), *cert. denied,* 335 U.S. 816 (1948); *Drakes Bay Land Co.* v. *United States,* 459 F.2d 504, 510-11 (Ct. Cl. 1972); *United States* v. *100 Acres of Land,* 468 F.2d 1261, 1266 (9th Cir. 1972), *cert. denied,* 414 U.S. 822 (1973); American Institute of Real Estate Appraisers, The Appraisal of Real Estate 64-65, 148 (7th Ed. 1973); College of the Fellows of the American Society of Appraisers, The Applicable Method for Valuation of Undeveloped Land for Which There Is No Current Market Value, 1975 ASA Valuation 88. A good deal of CNJ's land would have required much time and work to be sold for the projected highest and best uses.[36] As to such land there would seem to be no question that the discounting process proposed by the GPs is required. The deferral in the receipt of payment is as much a cost as expenditures required to place the property in its highest and best use, which clearly must be taken into account, *see* 4 Nichols, Eminent Domain § 12.3142[1], [2] (Rev. 3d ed. 1981); Norvell, Property, 35 N.Y.U. L. Rev. 1494, 1500 (1960). However, we agree with the GPs that this process should extend not only to the indeterminate amount of land requiring extensive work in preparation for sale but to all CNJ's real estate.

The cases stress that where the taking is of many parcels, the sale of which would stretch over several years, it is inappropriate to make an award on the basis of summing the market values of each on the date of the taking. *See Morton Butler Timber Co.* v. *United States,* 91 F.2d 884, 888 (6th Cir. 1937); *United States* v. *Cunningham,* 246 F.2d 330, 333 (4th Cir. 1957); *United States*

ex rel. TVA v. *Phillips*, 50 F. Supp. 454, 456 (N.D. Ga. 1943); *City of Caldwell* v. *Roark*, 437 P.2d 615, 617-18 (Idaho 1968). CNJ cites no contrary authority. It relies rather on the statement of its witnesses Hannoch and Heaney, 2 CNJ App. at 19, corroborated by that of Professor Stewart C. Myers, 2 CNJ App. at 1166, that "the value of real estate is created by the anticipation of future benefits and the appraisal seeks to reduce those anticipated future benefits to their present value" and that "[t]he comparable sales utilized in the appraisal process provide a measure of the present value of all anticipated future benefits with respect to the given property which was the subject to the sale." We do not doubt that this is true with respect to what a buyer would pay for any particular parcel; what it ignores is that when condemned property consists of many parcels, the condemnee would not receive the payments until some time after the condemnation date. In other words, the Hannoch-Heaney analysis would be valid only if they had been able to predict that sales prices would have risen sufficiently over their appraisal values to counteract the factor of time lag in receipt of the proceeds. This also is the answer to CNJ's seemingly pertinent question why a parcel in its hands should have a fair value less than it would if owned by another. CNJ owned not simply one parcel but an immense tract incapable of sale as such, and it is chargeable with the time lag necessary to effect the sales of the many parcels in the tract.

Such precedents as there are with respect to railroads support the GPs. The most important are the *New Haven Inclusion Cases*, culminating in the Supreme Court's decision reported in 399 U.S. 392 (1970), which, although not condemnation cases, were treated by all concerned as if they were. In these hotly contested proceedings neither the parties, the Interstate Commerce Commission, nor the three reviewing courts, in one of which a member of this court participated, ever questioned that it was necessary to divide the property into parcels, estimate the amounts that would be received over a period of years, and then

discount for the time that this would take, 331 I.C.C. 643, 663 (1967). The ICC also followed a practice of discounting in *Chicago & North Western Transp. Co.-Abandonment between Ringwood, IL and Geneva, WI*, 363 I.C.C. 956, 960-61 (1981), affirmed without discussion of this point in *Chicago & North Western Transp. Co.* v. *United States*, 678 F.2d 665 (7th Cir. 1982).

The CNJ advances a special contention with respect to the GPs' applying a discount to the $2,091,220 base value of land in 9 counties where such values were stipulated. The stipulation stated that the figures "represent the market value, *i.e.*, most probable selling prices, as of April 1, 1976, for nonrail use of all the parcels of land stipulated to have been conveyed by CNJ in the counties listed," Sp. Ct. Rptr. N-37753. CNJ contends that the stipulation prevents the GPs from arguing that it would have realized not these prices but only their discounted amounts. However, the stipulation was stated to be predicated on various assumptions, one being:

> the values are the sum of individual parcel appraisals, and the parties recognize that they take different positions as to whether the availability for sale of CNJ's conveyed property (other than the single parcel considered by each appraisal) and/or the property conveyed by the other transferors would have affected the final net realizeable nonrail use value of the property covered by this stipulation . . . .

Although this qualification seems to have been framed primarily to preserve the issue of glut, the language is sufficiently broad to permit the GPs to argue that the sum of individual parcel appraisals is not the correct measure for any reason, including that here considered.

(b) *The Pace of Disposal.* The GPs presented evidence with respect to the pace of disposal through two sets of witnesses. Four officers of Eastdil Realty Inc., a specialist in real estate and

management services, testified with respect to the estimated pace of sales for CNJ's developable properties.[37] Harry A. Wiedeman, a Conrail real estate manager, and Alf Moody, chief real estate appraiser for USRA, determined the pace at which the Transferors' abutter properties could have been sold. The result of their studies is represented by the following:[38]

GPs' Estimate of Pace of Sale of CNJ Real Estate
(in constant 1976 dollars)

Year	Developable*	20% Abutter	15% Abutter	Total	Total % Sold
1	4,836,598	731,909	907,217	6,475,778	26%
2	3,786,522	585,527	771,181	5,143,230	20%
3	2,781,975	468,422	655,504	3,905,901	16%
4	633,380	374,737	557,178	1,565,295	6%
5	633,380	299,790	473,601	1,406,771	6%
6	663,380	239,832	402,561	1,275,773	5%
7	617,318	191,866	342,177	1,151,361	5%
8	528,979	153,492	290,850	973,321	4%
9	447,202	122,794	247,223	817,219	3%
10	167,943	98,235	210,139	476,317	2%
11	96,910	78,588	178,619	354,117	1%
12	96,910	62,871	151,826	311,607	1%
13	96,910	50,296	129,052	276,258	1%
14	83,260	40,237	109,694	233,191	1%
15	17,665	32,190	93,240	143,095	.5%
16	0	128,759	528,360	657,119	2.5%
	15,458,332	3,659,545	6,048,476	25,166,353	100%

* Eastdil Testimony, Feb. 16, 1982 at 41.

Taking the two types of properties together, the estimates were that CNJ would have sold 62% of its real estate in all counties in the first three years and that even after ten years, 7% of its properties would have remained unsold.[39] The effect of applying the stipulated discount of 15.22% over so long a period is to reduce the GPs' estimate of the base value of CNJ's property by almost one-third.

CNJ did not offer a timetable of its own but submitted a long list of criticisms of the qualifications and methodologies of the GPs' experts. Although we believe a good many of CNJ's criticisms are well founded, we are satisfied that the GPs' projected time periods are excessive on other grounds.

A good starting point is the ICC's handling of the problem in the *New Haven Inclusion Cases, supra,* 331 I.C.C at 661. There the New Haven Trustees proposed a six year period for discounting to net present worth, which they recognized as being optimistic. Penn Central assumed that ten years would be required. The Commission adopted the Trustees' figure.[40]

More important than this is the GPs' failure to take account of the fact that CNJ would not have had to wait until April 1, 1976, to start lining up purchasers. In the *Rail Use Opinion,* 531 F. Supp. at 1311, dealing with properties that would have continued in rail use, we said:

> The process of disposing of rail properties would have begun in February 1973. Studies by acquirers of the properties and negotiations would have taken ten to twelve months, and ICC deliberations would have taken twenty to twenty-four months. Taking into account the possibility of judicial review, the properties would have been conveyed about April 1, 1976.

The considerations underlying that conclusion apply with equal force to the properties here at issue. We find that in the absence of the Rail Act the CNJ Trustee would have continued to negotiate with the State of New Jersey until say November 1, 1974, but that if these negotiations had not culminated in an agreement by that time—an assumption on which the GPs necessarily ask us to proceed—the Trustee would have filed the necessary abandonment applications[41] and begun the planning and negotiations which would be a necessary preliminary to sale. While we recognize that negotiations are hindered by even slight uncertainty whether a seller will be able to deliver, the Trustee could have

done much preliminary work. The contrary spectacle, urged by the GPs, of the Trustee sitting on his hands until April 1, 1976, and doing nothing in the way of starting dispositions conditioned on orders of abandonment he was practically certain to be able to obtain, is utterly unrealistic.[42] Taking similar factors into account, Hannoch and Heaney, in the course of explaining why their "market value" approach was advantageous in eliminating such uncertainties as future sales prices and the time of sale, went on to say, 2 CNJ App. at 20 n.*:

> However, based on our knowledge of the properties and advice from counsel that we may assume that CNJ would have had an approximately two year period prior to April 1, 1976, to begin marketing activities looking toward sales commencing April 1, 1976, we believe that properties representing well in excess of half of the total values estimated could have been sold on or promptly after such date. (2 CNJ App. at 20).

A second factor is that CNJ would have concentrated its attention on the most valuable parcels. A sale of even 15% of the acreage in Year 1 thus might well involve 35% of the value.

A third common sense observation concerns the exceedingly long time estimated by the GPs to be required for the sale of abutter properties. For reasons explained in earlier portions of the opinion, these properties are difficult to sell in the sense that there are only a few potential buyers; they are sold not by advertising campaigns or by canvassing long lists of companies that might be interested in acquiring property in the area but by direct communication with a handful—often as few as one, two or probably at most three—potential buyers. The paucity of buyers would, of course, have a negative effect upon the price and the appraisal witnesses properly took this into account. But we fail to understand why that factor should prolong the period of negotiation to as long as 16 years; if anything, it should shorten this. As Hannoch testified, "if [the adjoining property owner] is going to

buy it, he's going to buy it and if he's not, he's not." 33 GPs Supp. App. at 426. Counsel for the GPs suggested at argument that the sale of this kind of property would require a salesman who would not content himself with a couple of conversations "across the fence" but would cultivate the prospective buyer, go out to his home, and drum the advantages of the purchase into him. We do not know whether such hard sell tactics are effective but, if they are, a few years of such treatment would suffice. We suspect that the long periods that have been required to sell abutter properties in the case of railroad abandonments are due to the fact that the probable proceeds hardly merit the effort or to the fact that the properties could not be sold at all.

We conclude that the GPs' efforts at scientific forecasting of the pace of sale are unrealistic and produce incredible results. We think that, taking the above factors into account, a more realistic schedule would be:

Year 1—35%[43]
Year 2—20%
Year 3—10%
Year 4—10%
Year 5—10%
Year 6— 5%
Year 7— 5%
Year 8— 5%

While we recognize that some of the abutter properties would never be sold, sufficient allowance for this has been made by Van Horn's elimination of certain properties as valueless.

(c) *Appreciation.* As indicated, the GPs' theory, which we have adopted, is that if CNJ's parcels of real estate are to be valued at what prospective buyers would have perceived their value to have been on April 1, 1976, a determination must be made as to when these proceeds would have been received, and these proceeds less real estate taxes and other holding costs plus interim income are then discounted back to April 1, 1976. An

important item of interim income is any appreciation in the value of the parcels that would have been realized over the value perceived on April 1, 1976. This is particularly clear when, as here, the discount rate is high, reflecting a considerable allowance for inflation. To the extent that CNJ's real estate appreciated in an amount equal to the inflationary component of the discount rate, that component would be wholly offset.

In their Table 1 comparing their own and the CNJ's nonrail use value of the conveyed properties by asset account and item of expense, GPs Opening Brief at B-7, the GPs, apparently acknowledging this, propose the addition of appreciation of 0-5% per year. However, they do not indicate where they have landed within this broad range and do not make any attempt to quantify it or show any addition for it. The testimony of their expert Eastdil does little to clarify this. At one place Eastdil states:

> In projecting the revenue that the sales of the developable properties would have produced over time, we considered the possibility of price appreciation between April 1, 1976 and the dates of the projected sales contracts.

Eastdil Testimony, February 16, 1982, at 37. However, the immediately succeeding portion of the statement says:

> Such a projection of future appreciation depends largely upon how buyers and sellers perceived future market developments as of April 1, 1976.

The experts concluded that "most of the markets in which Transferor properties were located exhibited no potential for price appreciation during the projected disposition period", *id.* at 38, the only exception being industrial properties in Northern New Jersey (Non-Central Cities), where a 3% annual appreciation rate was used, two of the counties (one stipulated and one contested) where a 5% annual rate was used for commercial properties and a third stipulated county where that rate was used for

both residential and commercial use, *id.* Eastdil stated that "[t]he anticipated appreciation to be applied to our sales revenue projections is reflected in the discounted cash flow analysis submitted by other witnesses", *id.* at 39. However, the only example we have found of this is the Wiedeman-Moody study on the abutter properties where, although the authors believed that "[i]n general, once abutter right of way has been offered for sale, it is not possible to sell the property for a higher price, even at a later date", Wiedeman Testimony, February 16, 1982, at 17, they seem to have applied an Eastdil overall appreciation rate of 2.5% per annum to increase the base values, *id.* at 17-18, as supplemented.

CNJ has done little to help us understand either what was done by the GPs or what it thinks should have been done. It stressed that Eastdil did not investigate what had actually occurred, something literally impossible since the conveyed properties were not offered for sale, but was interested only in "what persons in 1976 are claimed to have expected appreciation to be". CNJ Opening Brief at 277. Beyond that and pages of potshots at various GPs witnesses, CNJ contents itself with a statement of GPs witness Barkan that land values in April, 1976 were depressed, but had "started to move out of that depression in the latter part of the seventies", 2 CNJ App. at 1232, and a statement of GPs witness Von Ancken that 1976 was one of the lower periods in valuation and that since then there had been a tremendous upward push in the value of industrial land in New Jersey. Against this the GPs cite statements by CNJ witness Van Horn that only a small degree of appreciation occurred in the Elizabeth area from 1974 to 1979, 39 GPs Supp. App. at 48E, and by CNJ witness Hannoch that during the latter half of the 1970's "there wasn't a big change in land values in downtown Newark, and in many instances, they were down rather than up", 33 GPs Supp. App. at 137.

Eastdil's method is only a partial method of measuring appreciation for the purpose here relevant. To the extent that otherwise

determined base values were factored upward to take account of appreciation as perceived on April 1, 1976, that is well and good but not sufficient. Take, for example, a property whose base value without allowance for appreciation would have been $100,000. If it was estimated to be sold in the third year and it was one of the few cases for which a 5% allowance for appreciation would have been made, it would be assigned a base value of $115,762 and that much appreciation would have been credited. If, in fact, property values actually rose so that its sales price in the third year would be $150,000, the additional $34,338 should be taken into account. Such considerations apply with even greater force where little or nothing was added to base values for appreciation perceived on April 1, 1976.

The GPs might answer that even if the answer to our question is "Yes", such recognition is impracticable, since it would involve a revaluation of the inventory of unsold properties at the end of each year. CNJ could reply with Hannoch's and Heaney's caution, cited above, that avoidance of any need for this is one of the great merits of their "market value" approach. We find that, as a matter of judgment applied to the record, 3% per annum should be added to real estate base values to reflect appreciation not taken into account in the GPs' figures.

Other Factors. We deal here with three subjects related to holding the real estate during the period required for sale—property taxes and other holding expenses on the negative side and interim income (other than appreciation) on the positive side.

(i) *Property Taxes.* Chief among the real estate "holding costs" that would have been incurred annually by CNJ for each unsold parcel were local property taxes.[44] CNJ would become liable for these taxes when it discontinued rail operations on its properties. For the GPs, Tesh produced a table of average effective tax rates as of April, 1976, in the 15 counties in which CNJ's conveyed properties were located. These ranged from 2½% to

6¼%. Tesh then applied the county-wide rates to CNJ's remaining real estate inventory over the projected period of disposition, keeping effective tax rates level but taking appreciation of the real estate into account. For CNJ, Van Horn made a similar computation, arriving at an overall effective rate of just under 4%, slightly higher than Tesh's overall effective rate. We adopt the GPs' figures.[45]

Two points of dispute remain. First, CNJ would have us reject Tesh's assumption that 1976 property tax rates would have continued without diminution into future years. Tesh introduced tables showing a mixed pattern of increases and decreases in local effective rates from 1973 and 1976 and testified that as of April 1, 1976, higher effective rates would have been predicted. We adopt the compromise position that effective property tax rates would have continued unchanged for the period of real estate disposition. Second, Van Horn noted that some delay could be expected before the local authorities would get around to putting CNJ's properties back on their tax rolls. While that may have been CNJ's actual experience with its retained real estate, it is a minor and unquantifiable item. Accordingly we follow the GPs in computing property tax liability as of April 1, 1976.

(ii) *Insurance, Maintenance, and Security Expenses.* The GPs estimate an annual deduction for miscellaneous holding costs of 1% of the base value of the remaining unsold real estate. On behalf of CNJ, Van Horn calculated that for retained real estate such costs had included $50,000 annually for insurance, $1,256 annually for security, and one-time expenses of about $9,000 for maintenance, alterations, and utilities. Without an estimate of the value of CNJ's retained real estate, we cannot derive from his testimony a percentage comparable to that put forward by the GPs for the conveyed properties. The GPs' figure of 1% per annum is within reason for the many necessary expenses of insuring, protecting, and maintaining unsold properties, and will be deducted from the value of real estate inventory over the disposition period.

(iii) *Interim Income.* Tesh, testifying for the GPs, estimated interim income from leases on the conveyed properties at $557,000 in the first year and declining thereafter with the value of real estate sold. Van Horn, using CNJ's inventory of conveyed leases, computed interim income at $778,500 for the first year. All but $38,000 of the difference was accounted for when Tesh explained that he disregarded income from leases that would terminate on cessation of rail operations, and Van Horn explained that he included such income. Tesh's assumption is consistent with nonrail use valuation and thus is the correct one for this case. We resolve the remaining $38,000 difference in the GPs' favor. Their witness used data from the leases in Conrail's possession, while Van Horn relied on an inventory of leases in CNJ's possession.

CNJ disputes not only the initial figure for annual interim income but also the rate at which that figure is applied to declining real estate inventory in future years. Neither party attempted to predict when the individual leased parcels would be sold. Instead, Tesh estimated that interim income would decline in proportion to the value of real estate sold, while CNJ argues that "loss of income from such typical types of railroad leases as crossing agreements would more plausibly appear to relate to the rate at which acreage is conveyed rather than proceeds received", CNJ Opening Brief at 304 n.*. Once leases contingent on continuing rail use are excluded, however, interim income would follow more closely the value of property than its size. Tesh's methodology for reducing the amount of interim income in years after 1976 is therefore approved.

The absolute amount of all three of these items must, of course, be recalculated to take account of the shorter holding period we have determined.

IV.

FACILITIES AND OTHER ASSETS

A. *Ballast and Fill*

The CNJ and GPs vary greatly on the value assigned to the ballast and fill material underlying the CNJ's tracks. Based on the testimony of Storm, who has observed the removal of ballast and fill from the CNJ's conveyed lines by Conrail, the CNJ has valued this material at close to $2.3 million. CNJ argues that Conrail's sale of this material demonstrates its positive value and that the CNJ would have had an advantage in marketing these materials in urban New Jersey due to a lack of fill sources in these areas.

Storm valued the ballast and fill by adjusting downward the market price on April 1, 1976 of $1.00 per cubic yard. Storm made a "blanket adjustment" of 70 percent for fill (down to $.30 per cubic yard) and 50 percent for ballast (down to $.50 per cubic yard) to account for any difficulties in removing and marketing this material. CNJ argues that this downward adjustment accounts for all the problems of removal, such as problems of access, compaction of material, and clearance of trees and brush. Storm's prices for ballast and fill were multiplied by the amounts of these materials that Storm estimated were available under CNJ's tracks (estimated to be 6.4 million cubic yards of fill and 754,435 cubic yards of ballast) to reach a total value of $2,294,000.

The GPs contend that the ballast and fill material has no value. The GPs note that none of the four valuation studies of the CNJ assigned any value to the fill and that only two of these studies, the Wyer Dick study and Peabody study, assigned any value to ballast.[46] The GPs contend that a zero value for ballast and fill is warranted because removal and transportation costs preclude the realization of positive value from their sale. The GPs point out that the narrowness of CNJ's roadbed, the height of the embankments involved, the compaction of the top layer of ballast and fill,

and the presence of trees and brush on many embankments would have made removal difficult in many locations.

The GPs also attack Storm's testimony and contend that it is inconclusive with respect to the value of ballast and fill. The GPs argue that Storm's testimony with respect to his observation of removal operations does not show how much fill was removed, who was removing it, what happened to it, or if any price was paid for it. Storm could not testify conclusively that Conrail was paid anything for the ballast and fill removed from CNJ's conveyed lines. *See* Storm Deposition, March 21, 1982, 1246-1262, 35 GPs Supp. App. at 311-26.[47]

We agree with the GPs that the CNJ has failed to prove that its ballast and fill had positive value. The testimony of Storm and his associates did not establish why Conrail removed this material or if Conrail was able to remove this material at a profit. The CNJ has also failed to support its assumption that the downward adjustment of the $1.00 per cubic ton takes into account the considerable problems of removing the fill. The CNJ would have faced problems of clean-up after removal and of possible erosion from the removal sites. Storm did not consider these problems in giving this material a positive value. Storm Deposition, April 15, 1982, at 2130-32, 35 GPs Supp. App. at 517-19. We also find it highly significant that none of the four studies gave any value to fill and that two of the studies placed a small value on the ballast while the two other studies found it to be worthless. Because of the inability of the CNJ to present convincing evidence of past sales or specific data regarding the market for ballast and fill in the relevant areas, we conclude that the value of ballast and fill is zero.

B. *Ties in Track*

Another major disagreement between the parties concerns the value of the ties in the CNJ's track. The CNJ contends that its ties have value for rail reuse and for landscape purposes, and it has valued these ties at $5,130,000. The GPs contend that the

glut of ties that would have resulted from the dismantlement of the Transferors in the absence of the Act would have made the CNJ's used ties valueless. The GPs also argue that the CNJ overstated the number of ties suitable for rail reuse and use in landscaping.

CNJ conveyed 1,295,155 mainline ties and 641,867 ties in yards and sidings. Of the mainline ties, Storm concluded that 50% were marketable for rail reuse at a net price of $5.00 per tie and that the remaining 50% were marketable for landscape use at a net price of $3.00 each. Of the ties in yards and sidings, Storm concluded that 50% would be reusable as landscape ties but that only 6,700 would be suitable for rail reuse. Storm based his tie classification upon track inspection, his review of CNJ subsequent tie replacements, and his general experience. He assumed that all ties suitable for reuse would be purchased for reuse.

The GPs assigned no value to ties based on the opinion of their expert Mewhinney. Mewhinney is president of Gillis & Co., one of the oldest and largest marketers of used and industrial ties in the country. Mewhinney testified that the number of ties entering the market in the absence of the Act, which the GPs estimated to be 9.9 million ties, would have flooded the market and prevented the Transferors from realizing any value for their used ties. Mewhinney testified that the used tie market for rail reuse is limited because railroads install new ties in main tracks and cascade their used ties into yards, sidings, and low density lines.[48] Mewhinney also testified that it was his experience that dealing in landscape ties was unprofitable. This testimony led the GPs to conclude that CNJ would have left its ties along its roadbeds because the cost to remove and market them would have exceeded proceeds from sale.

For a number of reasons, we find neither the position of the CNJ nor the GPs to be tenable. With respect to the CNJ's evidence on ties, Storm could not fully explain how he concluded that over 1.3 million of CNJ's 1.9 million ties were fit for landscape or rail reuse. The GPs presented evidence that roughly

86% of these ties were over 10 years old and would not have been considered fit for reuse. Storm also was unable to cite specifics justifying his reliance on track inspections in determining if ties were fit for reuse and failed to provide the criteria he used in assessing the suitability of a tie for reuse.[49] Finally, Storm's conclusion that 1.3 million ties were reusable is contradicted by Mewhinney's testimony that usually only three reusable ties were found in each 39-foot rail section during the dismantlement of track. Mewhinney Deposition, April 8, 1982, at 275, 34 GPs Supp. App. at 174. On the basis of Mewhinney's rule of thumb of three reusable ties per 39-fooot rail section, the expected number of reusable ties per mile is 406. If this figure is multiplied by the amount of conveyed main line track (395.8), which would have contained the ties best suited for reuse, the number of reusable ties based on Mewhinney's rule of thumb would have been 160,756.

The GPs' evidence concerning ties does not fare much better than that of the CNJ. Mewhinney's conclusion that there would be no value for used ties is a result of the assumption that 9.9 million ties of the dismantled Transferors would have entered the market for used ties beginning on April 1, 1976. The GPs, however, cannot maintain that all of these would have been suitable for reuse and flood the market while arguing that only slightly over 10% of the CNJ's ties were suitable for reuse. If what the GPs assert is true with respect to the suitability of CNJ's ties, certainly far less than 9.9 million ties would have been suitable for reuse and actually been fit to market. The GPs also ignore the DeLeuw Cather study for USRA which concluded that there was a substantial demand for used ties in the northeast for rail and other uses. DeLeuw Cather, Development of Standard Usage Salvage Values 23-24, 3 CNJ App. at 418-19. Although this study was undertaken in the presence of the Act, its conclusion undercut the GPs' argument that the market for used ties was so limited that the ties from any one dismantled Transferor would flood it.

Appendix J

Our examination of the evidence on ties leads us to conclude that the CNJ could have sold a limited number of its ties profitably. We conclude that the most accurate valuation of the CNJ's ties was performed in 1978 by Rodola, who served as Wyer Dick's project manager for the study of the CNJ's liquidation value. Rodola participated in the inspections of ties in the 1974 RCNLD Study and apparently reviewed the inspection papers in preparing his 1978 valuation of ties. *See* Storm Deposition, March 18, 1982, at 793-94, 35 GPs Supp. App. at 175-76. He concluded that 162,335 of CNJ's ties could have been sold for rail reuse[50] at a net price of $2.50 per tie. Rodola assumed that 115,453 ties (10% of the remaining ties), could have been sold for landscape use at a net price of $2.00 per tie. The total value for reuse and landscape ties in Rodola's calculations was $636,743.

We find these calculations to be reasonable. The 162,335 ties that Rodola found would be suitable for rail reuse corresponds closely to the 160,756 ties that would be expected during dismantlement if Mewhinney's rule of thumb of three ties per 39-foot rail section is applied. Rodola's figure also is far closer to the 266,000 ties that the GPs found fit for rail reuse than it is to Storm's figure of 524,809. With respect to landscape ties, Rodola's assumption that 10% of the remaining ties could be sold for landscape use is warranted. Storm testified that he was aware of the demand for landscape ties, and the DeLeuw Cather Study for the USRA anticipated a substantial market for the nonrail use of ties. Given the heavy competition from the other dismantling Transferors, the assumption that the CNJ would have been able to sell only 10% of its ties into the nonrail market for ties seems reasonable.

We also conclude that the prices of $2.50 net for rail reuse ties and $2.00 net for landscape ties are reasonable. Based on Storm's testimony, the CNJ assumed a net price for rail reuse of $5.00 per tie and for landscaping of $3.00 per tie without attempting to take into account the effect of the increased supply from the other dismantling railroads.[51] Although we disagree with the

GPs' contention that glut would render CNJ's used ties valueless, we conclude that the effect of this increase in supply would be to drive down the prices of used ties. We are also less optimistic than the CNJ about the demand for rail use ties because these ties would not be placed in main lines but only in sidings and light density lines. Rodola's net prices correspond to our estimate of the probable effects of increased supply and decreased demand on the prices that CNJ urges this court to adopt. We conclude that $636,743 is the proper value to be placed on the CNJ's ties in track.

C. *Rail and Other Track Material (OTM)*

The CNJ and GPs are far apart on their valuation of rail and OTM.[52] CNJ values this material at $27.6 million; the GPs value it at $16.8 million. This disparity results from disputes over the quantities of rail and OTM to be reused as opposed to be scrapped, the marketability of these materials, and the scrap prices for the rail and OTM not suited for reuse.

1. *The Suitability of CNJ's Rail and OTM for Rail Use*

A substantial difference in the value of rail and OTM is due to the amount of these materials each party classified as suitable for rail reuse. Suitability for reuse is essentially an engineering question focusing on the actual physical quality of the rail to determine if it can be safely and economically relaid. To determine suitability, Storm developed the CNJ's rail classification system based on the table for headwear standards developed by the American Railway Engineers Association (AREA).[53] Storm developed four different classes of relay rail into which rail would be classified, depending upon the condition of the track.[54] His associate, Rodola, evaluated the condition of CNJ's track using headwear data from the Bechtel Study[55] and field notes from his own track inspections and from the inspections of others, including those of Storm. Rodola then classified segments of the

CNJ's track based on their condition into the four categories developed by Storm.

For each of the four track-condition classes, Storm developed a system to determine what percentage of rail of a certain weight would be suitable for reuse. For example, Storm determined that 70% of Class I track of over 130 pounds would be suitable for relay in main line track, 20% would be suitable for relay in branch lines, and 10% would be scrapped. Storm's system also made overall deductions in tonnage to account for track defects, such as engine burn, and a 5% deduction for wear and tear (by stipulation of the parties). *See* Storm, Assumptions for Classifying Rail, August 22, 1978, 34 GPs Supp. App. at 523.

For OTM, Storm assumed that its condition would follow that of the associated rail. If the rail in a particular segment of track was classified as relay quality, the OTM and turnouts in the segment were also classified as relay. There are two exceptions to this classification. First, all bolts, spikes, and rail anchors were assumed to have only scrap value. Second, Storm concluded that turnouts in yards were maintained better than the surrounding track in order to prevent derailments. *See* Storm Deposition, April 14, 1982, 1991-92, 35 GPs Supp. App. at 491-92. For the most part, however, the CNJ's classification of its rail determined the classification of its OTM.

Rather than rely on standards tied to the AREA table for headwear, the GPs developed their own system to classify rail. The GP's rail classification system did not focus on the engineering question of suitability, but mixed criteria to determine the fitness of the rail with marketing criteria not intended to evaluate the rail based on its condition. The GPs concluded that only rail which was suitable for reuse in main and important branch lines would have been sold for reuse. The GPs concluded that there was no market for any other quality rail, and they designed their classification system to eliminate all rail that could not be relaid in main lines.

The GPs' first criterion was to eliminate all rail which was less than 115 pounds.[56] The GPs concluded that this rail was too light for main track use and that even though it might be fit for reuse in yards, sidings, and light density branch lines, there was no market for this rail. According to the GPs, rail purchasers would have generated enough rail internally through the process of cascading to meet their needs for yards, sidings, and light density branch lines. The GPs classified all rail in this category as scrap.

The GPs' remaining criteria focus more on the actual condition of the track rather than its marketability. First, the GPs eliminated all rail which did not meet the vertical headwear limits for main and important branch lines under the AREA standards. Second, the GPs eliminated all rail which had been cropped twice. This rail was 36-feet in length and had already been removed twice from the track. Because the GPs concluded that this rail would not be suitable for reuse in main and important branch lines, they classified it as scrap. Third, the GPs focused on end batter—the wear and tear on the ends of rail caused by the wheel as it moves across the gap between rails that exists in bolted rail. The GPs classed as scrap all rail with end batter exceeding ¼ inch.[57]

The GPs' next criterion was controlled cooling. Controlled cooling is a process developed in the 1930's to help prevent internal defects from forming in rails. The GPs concluded that purchasers of used rail for main and branch lines would have insisted that the rail be controlled-cooled. In its analysis, the GPs assumed that all rail rolled before 1942 was non-controlled-cooled and classified pre-1942 rail as scrap.

The GPs' final criterion was defects per mile. The GPs concluded that rail with more than two defects per mile per year was not suitable for reuse. The GP's experts contend that industry standards call for the removal of track with this level of defects

and recommend that it not be relaid in main line track. Morgan/Gabriel Deposition, March 29, 1982, at 115-116, 34 GPs Supp. App. at 284-85.

For OTM, the GPs agreed with the CNJ that all bolts, spikes, and anchors should be scrapped. The GPs classified all joint bars as scrap because purchasers would have cropped and welded used rail and not had a need for joint bars. For turnouts and tie plates, the GPs assumed that the CNJ would have had enough reusable tie plates and turnouts to match the quantity of rail that was considered marketable for relay.

The end result of the two different approaches of the GPs and CNJ is that the GPs found far less of the CNJ's rail suitable for reuse. Based on our examination of the different methodologies employed, we conclude that the CNJ's approach is superior. The basic thrust of the CNJ's methodology was to focus on the actual physical condition of the rail based on inspections and the Bechtel data, to classify rail based on that condition, and to determine the percentage of rail within a class that could be reused based on knowledge of CNJ's rail. The GPs' methodology was to begin with the assumption that only rail greater than 115 pounds in weight and that was capable of reuse in main lines and high density branch lines would be suitable. The GPs then constructed criteria to weed out rail that did not fit this mold.

The problem with the GPs' approach is that suitability for reuse, which is essentially a question of engineering concerning the physical quality of the rail, became intertwined with its marketability, which is a separate but important issue. Rather than examining all of CNJ's rail to determine if it was suitable for reuse at some level according to industry engineering standards, such as the AREA headwear table, the GPs assigned the vast majority of rail that is in good physical condition to the scrap heap based on marketability. The CNJ's approach, an engineering analysis of the condition of the rail, was more appropriate to establish suitability for reuse.

There are also flaws in the GPs' methodology. The GPs used only the headwear limits for the main and branch lines in the AREA tables but did not apply the headwear limits from the lower end of the table to determine if CNJ's rail was suitable for use on lines that were not main or high density branch lines. Similar problems exist in the rail length criterion. AREA guidelines permitted use of less than 36-foot length rail in relay, and the Pennsylvania Railroad Specifications for Grading Secondhand Rail recognizes that less than 36-foot lengths are appropriate for relay rail in main line trackage. Morgan/Gunderson Study, January 31, 1979, at III-38, 3 CNJ App. at 427. The GPs assumed that no one would want this rail rather than determining if it is suitable for use. Two of the GPs' other criteria, end batter and defects per mile, are flawed because the practice of cropping rail before reuse would eliminate end batter[58] and many of the defects per mile.[59]

We also find fault with the GPs' controlled cooling criterion. The 1942 cut-off date was based on Morgan's belief that by 1942 all new rail going to Class I railroads was controlled-cooled. Yet, even Morgan conceded that controlled-cooled rail was used well prior to 1942. Morgan/Gabriel Deposition, February 16, 1982, at 94, 3 CNJ App. at 160. There is also no AREA prohibition against non-controlled-cooled rail, but only a recommendation that it be welded separately from controlled-cooled rail. Storm Rebuttal Testimony, June 2, 1982, at 17-18, 3 CNJ App. at 474. Finally, any defects in non-controlled-cooled rail should have appeared well before now.[60] Morgan's testimony shows that most defects would appear before 20 years. *See* Morgan/Gabriel Deposition, March 29, 1982, at 92-93, 3 CNJ App. at 158-159.

For OTM, we conclude that its condition will be the same as the rail it is associated with. If the track and rail in a given segment are in good shape, it follows that the OTM in that segment would have been well-maintained and suitable for reuse. We reach the same conclusion with respect to turnouts, despite

CNJ's contention that the turnouts in its yards are in far better condition that the rail it is associated with. The only evidence CNJ produced to support this contention is Storm's testimony that turnouts in yards were in better condition than the poor state of the rail in these areas in order to prevent derailings. *See* Storm Deposition, April 14, 1982, at 1991-92, 35 GPs Supp. App. at 491-92. CNJ never produced any data to substantiate Storm's opinion, such as inspection notes or data from the Bechtel Study, and in the absence of objective verification of his opinion, we conclude that turnouts are in the same condition as the rail with which they are associated. In determining the amount of rail and OTM suitable for reuse, we will use the CNJ's figures, and for turnouts we will assume that the percentage of turnouts and rail suitable for reuse will be the same.

2. *The Marketability of CNJ's Rail and OTM*

The major difference between the parties' values for rail and OTM results from conflicting views over how much of this material would have been marketable. The CNJ contends that it has proved the marketability of all of its rail and OTM that was suitable for reuse in accordance with the Stipulation Regarding April 1, 1976 Unit Price of Relay Rail and Reusable Other Track Material, Sp. Ct. Rptr. N-37336 ("Rail Stipulation"). The Rail Stipulation provides:

> 1. The unit price as of April 1, 1976, which is to be applied to all rail found suitable and marketable for relay on main lines, branch lines, or yards and sidings, is $207.50 per net ton.
>
> 2. The reuse unit price of other track material consisting of angle or joint bars and tie plates as of April 1, 1976 is $227.50 per net ton.

* * *

5. The parties hereto further agree that this stipulation in no way precludes or prevents the Government Parties from:

(a) introducing evidence concerning the quantities of the transferors' rail that would have been suitable for relay, suitable for reroller, and suitable for scrap purposes;

(b) introducing evidence as to how much of the rail classified as suitable for relay purposes would have been marketable at a relay price in light of the addition to the market of the amount of rail being disposed of by the transferors;

(c) introducing evidence that in transactions where other track material is sold together with relay rail, the price of the other track material per net ton would be the same as the price of the relay rail.

6. Likewise, this stipulation in no way precludes or prevents the transferors from introducing evidence contrary to the Government Parties' evidence referred to in paragraph 5.

According to the CNJ, the Rail Stipulation places on the GPs the burden of showing that rail suitable for relay use would not have been marketable.

The GPs contend that they have shown conclusively that the only rail that would have been marketable for reuse is the rail suitable for reuse in main and important branch lines. Morgan testified that rail purchasers would have generated enough rail that was suitable for use in yards, sidings, and light density branch lines through cascading when they replaced main line rail. Morgan/Gabriel Testimony, February 16, 1982, at 13-14. As a result, the only rail these purchasers would have been interested in is rail for main or branch lines. CNJ's rail already in yards and sidings would be in no better, and possibly in worse condition, than the cascaded rail of the purchaser. Applying this marketing criterion, the GPs eliminated as unmarketable all rail under 115

pounds, all non-controlled-cooled rail, and all rail that had been cropped twice because this rail would not be used on main lines or important branch lines. The GPs do not acknowledge the existence of a market for CNJ's rail that is suitable for reuse in light density branch lines, sidings, or yards.

After the GPs presented their evidence on marketability, the CNJ attempted to rebut this evidence with testimony of Storm. Storm concluded that demand exists for lighter rail based on evidence (1) that cascading of rail could not be expected to satisfy demand for lighter rail; (2) that Class I railroads had very substantial quantities of lighter rail in track; and (3) that the rail replacement standards of many carriers permit the use of light rail. The CNJ also points out that DeLeuw Cather concluded that lighter weight rail could be sold[61] and that the Missouri-Pacific continued to relay rail as light as 90 lbs. in all classes of its tracks. *See* Morgan/Gunderson Study, January 31, 1979, at III-34 to -36, 3 CNJ App. 424-26. Based on this evidence, the CNJ contends that it has shown that all of its rail suitable for reuse would have been marketable.

CNJ's final contention on marketability concerns fairness. CNJ contends that the Rail Stipulation recognized that there are numerous grades of rail relay and that the CNJ was not required to limit its claims to rail suitable for use in place of new rail. The stipulation price reflected an average price (less than what the CNJ would have proven for its best relay and more than the price for its worst relay) designed to simplify computation but not meant to alter the attractiveness of the lesser-grade rail to potential buyers by pricing it higher. According to the CNJ, the GPs are trying to deprive it of the bargain worked out in the Rail Stipulation by allowing it a low price for its best rail while denying it any compensation at all for lesser-grade rail. The CNJ contends that the Rail Stipulation requires compensation at the agreed price for its lesser-grade rail to balance out the lower price it agreed to for its best rail.

Determining the marketability of the CNJ's heavier rail is not difficult. For rail over 130 lbs., the parties agree that all of this rail suitable for reuse would be marketable.[62] Nor do the parties disagree substantially over the marketability of the 130 lb. rail that is suitable for reuse. The major differences stemmed from the GPs elimination of all rail that was non-controlled-cooled or that contained more than two defects per mile per year as unsuitable for reuse. We have already rejected these contentions of the GPs, and we conclude that there would have been a substantial market for this rail because its heavy weight would have made it attractive to purchasers for reuse in any class of track, including main lines.[63] We therefore adopt the CNJ's conclusion with respect to the amount of 130-lb. rail that would be marketable for relay.[64]

A more difficult issue is the amount of the CNJ's lighter rail which would be marketable. We agree with the GPs that there would have been virtually no market for this lighter rail. The GPs presented substantial testimony that railroads would not have been interested in the CNJ's lighter rail, which weighed from 70 to 100 lbs., because of the overwhelming use of heavier rail on main and important branch lines. *See* Morgan/Gabriel, June 2, 1982, at 7. Cascading of rail from these lines would have fulfilled the demand for rail to be relaid in light density branch lines or sidings. There also would have been substantial amounts of heavier used rail generated by the dismantling Transferors which would have been available to rehabilitating railroads for use on these lines that would have further lessened the need for CNJ's light rail.

We also find that Storm's testimony with respect to the marketability of CNJ's lighter rail is unconvincing. Storm's testimony that there is a substantial amount of lighter track in use and that the engineering standards of railroads allow its use does not prove that railroads would buy this type rail but only that they bought this rail in the past and consider it acceptable. The main examples Storm gave of purchases of light rail showed a limited

demand for rail weighing between 110 and 115 lbs. and not a demand for rail weighing 70 lbs. to 100 lbs. *See* GPs Opening Brief at H-32.

Finally, we reject the CNJ's fairness argument that the Rail Stipulation requires compensation for its lesser grade rail at the stipulated price. The language of the Rail Stipulation is clear that the issues of both marketability and suitability could be contested by the GPs, and the GPs properly presented evidence that this lighter rail was not marketable. Neither the letter nor the spirit of this agreement was violated. We hold that none of the CNJ's rail weighing 100 lbs. or less would have been sold as relay.

With respect to OTM, we conclude that the amount which CNJ would have sold is determined by the amount of rail sold. If a railroad purchased relay rail it would have desired the OTM necessary to install the purchased rail. We conclude that purchasers would have desired used tie plates and turnouts in the quantities needed to install with the rail[65] but would not have purchased angle bars or joint bars, because these are not needed in laying continuously welded rail.[66] For example, because the CNJ has proved that 89.8% of its rail weighing over 130 lbs. is marketable and suitable, an equivalent percentage of the total amount of tie plates and turnouts associated with the over 130 lb. rail should be valued as marketable and suitable.

We also conclude that the CNJ failed to prove that joint and angle bars could have been sold for reuse separate from the rail they were taken from. Storm made a judgment that such a market existed, but he was unable to provide any basis for his judgment. Storm Deposition, April 14, 1982, at 1974-75, 35 GPs Supp. App. at 478-79. A more reasonable judgment is that railroads could have generated the limited number of angle and joint bars needed to repair their jointed rail track through cascading. We hold that all of the CNJ's joint and angle bars should be treated as scrap.

Appendix J

3. *Summary of Conclusions on Suitability and Marketability*

We will not attempt to calculate the exact amounts and values of rail, OTM, and turnouts that we have determined would have been purchased. The determination of value is left to the parties to be calculated in accordance with this opinion. To summarize, we have concluded that the CNJ correctly determined the amounts of rail weighing 130 lbs. or greater that would have been sold at the relay price. We conclude that all of CNJ's rail weighing less than 130 lbs. should be valued as scrap (the price of scrap is discussed *infra* at Section IV.C.4.) For OTM, the amount of tie plates associated with the rail which would have been purchased for reuse should be valued at the reuse price. Angle bars, joint bars, bolts, spikes, and anchors should be valued at scrap. For turnouts, the turnouts accompanying rail purchased for reuse should be valued at the reuse price; the remainder should be valued as scrap.

The reusable rail and OTM should be valued at the prices set forth in the Rail Stipulation. We reject the GP's contention that they have proved that OTM and rail would have been sold together at $207.50 per ton.[67] The GP's experts testified that OTM and rail generally are sold together at the same price, yet they also stated that prices vary widely and that each sale is unique. Testimony of Mauro, Michaels, and Kovalchick, October 26, 1981, at 9-10, 4 CNJ App. at 732-34. This testimony is too inconclusive to warrant not using the stipulation price. To value turnouts, the parties should apply the incremental reuse values that both sides have agreed are appropriate. *See* Morgan/Gabriel Testimony, February 16, 1982 at 25; Testimony of Shannon, Meyer, Storm, Dunn, October 26, 1981, at 6-7 (submitted on behalf of EL).[68]

4. *Scrap Values*

The final issue in valuing rail, OTM, and turnouts is to determine a price for the material to be scrapped. The CNJ determined scrap prices by averaging quoted market prices for the various classes of scrap for the first six months of 1976. CNJ obtained its quotes from *Iron Age*, a weekly publication of steel prices, and each unit price reflects the average of twenty-six quoted prices. The result of the CNJ's methodology was to price scrap rail of random lengths at $84 per ton, scrap rail two feet and less in length at $96 per net ton, and scrap OTM and turnouts at $86 per ton.

The GPs' price for rail was determined in a multistage process. Ralph Michaels, an expert on the scrap metals industry, conducted research on the nature of the scrap market and the grades of scrap metal which could have been recovered from rail properties.[69] Dr. James Kneafsey analyzed the effect of glut on the scrap market for the GPs. Based on his analysis of historical trends in the scrap market, Kneafsey concluded that for each 1% increase in the supply of primary grades of ferrous scrap, there would have been a .5% decline in scrap prices. George T. Mauro used prices in the first three months of 1976 to determine a base price for scrap of $76 per net ton for rail and $85 per net ton for reroller rail. Mauro then applied Kneafsey's formula using the GPs' figures for the quantities of scrap that would have been generated by the dismantlement of other Transferors. Mauro concluded that the price of rail would have dropped to $71 per net ton and the price of reroller rail to $79 and $80 per net ton.

The analysis of scrap prices presented by the parties presents numerous problems, the methodologies of both the CNJ and GPs contain serious flaws. The most serious flaw in the CNJ's data is its failure to account for the effect of glut in the scrap market caused by the dismantlement of other Transferors. This flaw is mitigated to some extent because the effect of glut obviously is not as great in the scrap metal market as it would be in other markets

for railroad assets, such as in the market for reusable rail or for locomotives.[70]

The GPs' methodology also is flawed. Their model did not include any data on the export market even though it accounts for a substantial portion of the total market. The GPs also did not consider any sales to scrap dealers in their model because these dealers resell scrap to end users. The GPs failure to analyze the demand of scrap dealers ignores the possibility that these potential purchasers may have wanted to beef up their inventories of scrap.

Another serious problem in the GPs' methodology stems from their rail classification system. The GPs' rail classification system overstated the amount of rail from CNJ and the other Transferors that would have been scrapped. Mauro relied on these overstated figures to determine the impact of glut on prices in the scrap market caused by the dismantlement of the Transferors' lines. Although we cannot determine the exact effect on the GPs' scrap price caused by overstating the amount of rail that was to be scrapped, the obvious effect would be to lower the scrap price calculated using the GPs' model.[71]

Neither of the scrap prices presented is without flaws. We conclude, however, that the CNJ's methodology is less flawed and sets a fair price for scrap rail, OTM, and turnouts. The GPs' methodology simply is open to question on too many fronts. The CNJ's methodology was straight forward, and that it did not take glut into account is not fatal given that the effect of glut in the scrap market would not be as pronounced as it would be in other markets for the assets of dismantling Transferors. We also note that the price of No.1 railroad heavy melt, expressed in constant dollars, ranged from $73.343 to $168.99 per net ton during the period from October 1973 to April 1976. *See* Kneafsey Testimony, February 16, 1982, Table 1, 3 CNJ App. at 9. The price on April 1, 1976 was $89 per net ton. The CNJ's figures are in the lower end of the range of prices for iron scrap during the relevant time period, and we hold that the CNJ's scrap prices

should be used in determining the value of rail, OTM, and turnouts that would have been scrapped.

D. *Ties in Inventory*

The CNJ had approximately 190,000[72] new ties in its inventory, and the great majority of these ties were at tie treatment plants rather than at CNJ facilities. The CNJ contends that the liquidation value of its new tie inventory is equal to their cost, which is $1,723,172. The CNJ argues that no deductions should be made from this amount because no costs would be involved in selling ties that were already at treatment plants.

The GPs, based on Mewhinney's testimony, valued the CNJ's untreated ties at 75% of the prevailing raw materials price for ties in the Northeast and treated ties at 75% of the prevailing market price for new ties. The value arrived at is $866,732, which is $856,440 less than the inventory value. The GPs' lower value for ties stems from several sources. Mewhinney testified that railroads would not have been willing to disrupt normal purchases to obtain ties from the CNJ, which would limit the CNJ's market. The GPs argue that the untreated ties needed prompt treatment to avoid deterioration, which would force the CNJ to accept below market prices. The GPs also argue that shipping and handling costs would have driven down the realizable value both for treated and untreated ties. The effect of these factors was a greatly reduced value for ties.

We conclude that the value for new ties falls between the figures of the two parties. The CNJ cannot realistically say it would have incurred no costs whatsoever in disposing of these ties, yet we find it unreasonable for the government to argue that deductions are warranted for shipping ties to be treated when the vast majority of ties are located at treatment plants. We also find it unreasonable to assume that railroads would have had no interest in the CNJ's ties out of a desire not to disrupt normal supply channels. The precarious financial state of most railroads would certainly have made them interested in potential bargains on ties.

Our compromise is to value the CNJ's ties in inventory at 85% of their costs.[73] This reduction in price should account for the CNJ's selling and disposition costs as well as any reductions in price necessary to sell the ties. We hold that the ties in the CNJ's inventory are worth $1,464,696.

E. *Rail in Inventory*

The CNJ valued the rail in its inventory at $813,400. The CNJ assumed all rail listed in its inventory as relay would sell at the stipulated relay price, and it priced all rail listed as scrap in its inventory at the scrap price. The GPs valued all of this rail as scrap, contending that it was all secondhand rail of mixed sizes and weights that would not be purchased for reuse.

Due to a lack of evidence on the fitness of this rail for reuse, we hold that all of it should be priced as scrap. Neither side inspected this rail to determine its actual suitability for reuse. Storm merely assumed that all rail listed in the inventory by linear feet was relay and that rail listed by ton was scrap. He had no basis for this assumption because he did not inspect the rail. Storm/Dunn Testimony, March 19, 1982, at 894-95, 35 GPs Supp. App. at 230-32. All of this rail had been removed from the first position. There was also evidence that some of this rail was: (1) of odd lengths, *see* CNJ Workpaper 000390, 35 GPs Supp. App. at 562; (2) less than 130 lbs. in weight, *see id.;* (3) lying out alongside the CNJ's track, Storm/Dunn Testimony, March 19, 1982, at 903, 35 GPs Supp. App. at 239; and (4) specially drilled, *see id.* at 897, 35 GPs Supp. App. at 233. This evidence compels the conclusion that the rail should be valued at scrap. We conclude that this material has a net liquidation value of $275,248.[74]

F. *Other Materials and Supplies*

Outside of its new tie and used rail inventory CNJ also has a number of other asset accounts that have been grouped together under the name "Other Materials and Supplies." This category

mainly consists of CNJ's inventory of replacement parts for its equipment and used OTM and turnouts.[75] CNJ assigns a value of $1,537,585 to these assets, while the GPs argue for a value of $888,400.

The CNJ appraisers arrived at their figure by taking the book value of the other materials and supplies accounts and making a 40% across-the-board reduction. CNJ argues that the replacement parts easily could have been sold to the parties purchasing used CNJ equipment. With regard to OTM, CNJ contends that the GPs are bound by the prices they stipulated for OTM.[76] CNJ maintains that the government should value used turnouts at 75% of their cost to be consistent with their valuation of CNJ turnouts located in track. Finally, CNJ contends that it has anticipated any problems in marketing the remaining materials and supplies in its arbitrary 40% reduction of book values.

The GPs rely on their appraisers' detailed analysis of the asset accounts at issue. They contend that CNJ, rather than taking the time to conduct an individualized study of the accounts, adopted an arbitrary and unsupportable reduction in value. The GPs also refer to evidence that railroads rarely buy used parts from other railroads and that any sales would be expensive to consummate. After making adjustments for the difficulty of sale and the lack of demand for individual asset categories, the GPs appraisers' estimate of the aggregate value of CNJ's other materials and supplies came to about 35% of the book value of the asset.

We accept the GPs' premise that other railroads would be hesitant to purchase replacement parts from the CNJ. The GPs have presented sufficient evidence to indicate that the practice within the rail industry is to purchase such parts at the time new equipment is acquired. Even if purchasers of CNJ locomotives were willing to purchase the corresponding replacement parts from CNJ, we find that they would not have paid much more than the scrap value of those parts. We also find the GPs' particularized approach preferable to CNJ's arbitrary 40% reduction in

establishing the NLV of the remaining assets in the other materials and supplies category.

Turning to OTM inventory, we need not consider CNJ's contention that the GPs' valuation of OTM in track should apply with equal force to OTM in inventory. These stipulated values only apply to OTM that is sold for reuse. As we indicated in our discussion of OTM and turnouts located in track, these items could have been sold for reuse only to the extent that the corresponding rail would have been sold for reuse. Because we hold that the rail inventory would have been sold as scrap, OTM inventory must receive a scrap value as well. We also see no inconsistency in the GPs' valuation of the turnout inventory. Accordingly, we adopt the GPs' estimate of the value of other materials and supplies.[77]

G. *Miscellaneous Assets*

1. *General*

We have grouped within this category office furniture and equipment, police and fire equipment, and other miscellaneous items. CNJ argues that these assets have an aggregate value of $107,000. CNJ did not provide testimony as to the value of the individual items in its inventory or as to how much of its $107,000 figure is attributable to Police and Fire Equipment and how much to Office Furniture and Equipment. The GPs have estimated the value of the assets to be $20,573. The GPs' figure consists of $18,117 for Office Furniture and Equipment, and $2,456 for Police and Fire Equipment. CNJ values most of these assets by taking their value as listed on its books and reducing that amount by an arbitrary figure to reflect any difficulties that it would incure in selling them. For the most part the arbitrary adjustment is a deduction of 40% of the book values of the assets. While recognizing that the GPs take a particularized approach to these assets, CNJ contends that the GPs failed to inspect physically the assets to arrive at a reasonable NLV. The GPs counter

that they were unable to take physical characteristics of each asset into account because CNJ provided a list of these assets without any description of their condition or whereabouts. In addition, the GPs point out that the CNJ has requested $50,000 for assets which it has not even listed.[78]

Under Paragraph 2 of the Sixth Pretrial Order we required each Transferor "to file a statement by July 15, 1981 identifying and describing with particularity each asset transferred pursuant to the Rail Act which has not been the subject of an inventory stipulation and for which the transferor claims nonrail use value." We hold that with respect to the miscellaneous assets, CNJ has failed to comply with the Sixth Pretrial Order. While CNJ did provide an inventory listing for these items, this list is so lacking in essential details as to be of no use in any meaningful appraisal. In fact, virtually no descriptive information is set forth in the CNJ inventory list. In many cases there is no indication whether the desks, tables, chairs, and other furniture were made of wood or metal. There is also no way of determining the age, model, size, or condition of the typewriters, calculators, adding machines, air conditioners, space heaters, and other mechanical equipment listed. Therefore, we accept the GPs' valuation of these assets.

2. *Signals and Communications*

CNJ argues that signals and communications assets are worth $110,000. The GPs set the value of this category of assets, which includes freight locomotive radios, vehicular radios, and copper wire at $27,000. We find the GPs' analysis to be more credible and, therefore, adopt their figure.

A large part of the dispute between the parties results from differences as to the net value that should be assigned copper wiring that would be removed from these assets and sold separately. Storm estimated the cost of removal and disposition of this wire at 25% of gross value, resulting in a figure of $23.00 per

wire mile. Storm/Dunn Deposition, March 19, 1982, at 970, 35 GPs Supp. App. at 253. Wyer Dick used a $30.00 per wire mile figure to calculate the same kinds of costs as of 1968. The GPs on the other hand conducted a detailed analysis of the procedures and costs involved in removing and disposing of these assets which we adopt.

V. EQUIPMENT

A. *Locomotives*

According to both the GPs' and CNJ's valuation, locomotives represent by far the most valuable equipment account. Unfortunately, there is a wide discrepancy between the parties' respective figures. CNJ has valued the locomotives at approximately $7.9 million and the GPs have valued them at approximately $3.3 million.[70]

The fundamental explanation for this discrepancy is the parties' disagreement over how many of the 78 locomotives conveyed by CNJ would have sold for rail reuse or, alternatively, for scrap. Both CNJ and the GPs agree that CNJ could have sold at reuse prices its twenty high horsepower diesel road locomotives built in 1965 and 1967. The parties disagree, however, with respect to the remaining 58 locomotives which CNJ owned and conveyed, all switchers built between 1939 and 1953. Of these 58 units, CNJ contends that 32 would have been sold for reuse and 26 at about twice scrap value for their usable parts. The GPs, on the other hand, assert that they would have been marketable only at scrap prices.

In reaching their conclusion the GPs have assumed that only yard locomotives less than 15 years old would have been sold for reuse. Although CNJ has gone to great lengths in its briefs to attack the validity of this 15 year "breakpoint," such an approach is not particularly material because the 58 units in question were considerably older than 15 years. Rather, the appropriate

inquiry is whether CNJ could have sold for reuse any of its locomotives which in 1976 were between 23 and 37 years old.

The GPs assert that CNJ's older units would not have been marketable for reuse for three basic reasons. First, they contend that the older locomotives have been superseded by a "second generation" of diesel-electric locomotives built during the mid-1960s, and that by modern standards the older units are "technologically crude." GPs Opening Brief at K-9. Second, they contend that in 1976 there was a substantial surplus of locomotives due to a severe decline in traffic since 1973. Third, the GPs argue that wholly apart from the alleged surplus, as of April 1, 1976, the market would have been flooded by the release of the many locomotives not needed for the proffered lines of Penn Central, Erie Lackawanna, and Reading Railroads.

Although the parties disagree about whether the new "generation" of locomotives was built during the early or mid-1960s and whether it should properly be considered a "second" or "fourth" generation, it is clear that a new and better breed of locomotive did come on the market sometime in the 1960s. It is also clear than CNJ's 58 older units lacked many of the technological refinements found in the more modern models. Among these refinements were turbochargers, improved wheel slip control, solid state controls, alternators in place of direct current generators, improved traction motors, etc. CNJ does not seriously dispute that these refinements represented improvements in operating performance, reliability, and maintenance.

It is CNJ's position that by failing to consider that new technology may be incorporated into older units, the GPs have overstated the impact of technological development on the value of CNJ's older fleet. Although it certainly is possible to retrofit the older units with much of the most recent technology, it is doubtful that such a possibility would have significantly enhanced the value of these 58 units in 1976. Assuming that advanced technology can be successfully incorporated into older units to the extent that CNJ contends, there is little reason to believe that its 58 switchers

would have been attractive candidates for a retrofit program. The expense of technological improvements is most sensible in units with a substantial service life remaining, and this dispute concerns CNJ locomotives built from 1939 to 1953. The life expectancy of switchers such as CNJ's is not clear; a CNJ witness gave the national average age of yard switchers as something in excess of 30 years. In the light of the limited nature of yard work, we find that the life expectancy of the CNJ yard switchers was 30 years. The average service life of a road switcher would be somewhat less.

The CNJ units built between 1939 and 1942 would have been between 34 and 37 years old in 1976 and would have been near the end of their service life. The switchers built between 1950 and 1953 would have been between 23 and 26 years old, and would have had about one quarter of their useful years remaining. Units that old are not likely candidates for retrofit, but even if they were, the competitive position of the CNJ units was poor. CNJ owned no locomotives built between 1954 and 1964. Even if any of CNJ's 58 locomotives could have been modernized for reuse, they would have had to compete not only with comparable units, but also with the many newer units owned by other Transferors. In terms of reliability and maintenance, CNJ's units would not have compared well with the younger models.

The GPs' second contention is that a "substantial surplus" of locomotives existed in 1976 due to a simultaneous decline in traffic and increase in size of the national equipment fleet. Although CNJ's reply argument misses the mark,[80] the GPs' showing with respect to the alleged surplus is inadequate. As evidence of the surplus, the GPs merely observe that in 1975 originated tonnage and freight train miles had declined from 1973 levels while the number of freight cars and locomotives had increased by about 1%. Although originated tonnage levels reflect freight car requirements to some extent, and freight train miles reflect locomotive usage, the GPs' statistics do not reflect any clear trend in the industry.[81]

The GPs further argue that the alleged surplus is demonstrated by the fact that new locomotive acquisitions in 1976 were considerably lower than the preceding three years. The market for used locomotives does not necessarily parallel that for new locomotives; the evidence shows that installations of new locomotives have increased in certain years when installations of used units were declining, and vice versa. *See,* e.g., figures for 1962-1963, 1973-1974, and 1975-1976, 36 GPs Supp. App. at 179.

The GPs note that the market in which CNJ's locomotives would have been valued would have included not only CNJ's units, but also locomotives of Penn Central and other Transferors. The GPs contend that the proper approach in calculating alternative scenario nonrail use values is to follow a so-called "residual scrap model" and "price the property remaining in rail use by looking at a market affected by the simultaneous scrapping of all properties that would be withdrawn from rail use." They argue that as of April 1, 1976, the market would have been flooded with used rolling stock released by the other Transferors, and that potential buyers would have had their choice of good equipment at bargain prices.

An accurate assessment of the market effect of the Transferors' disposition of all properties withdrawn from rail use would require a detailed analysis of the amount, time and pricing of such dispositions. The court has heard no such evidence, but the difficulties of proof do not mean that the GPs' point should be ignored altogether.

The GPs have asserted, and CNJ has not attempted to rebut, that Penn Central, Erie Lackawanna, and Reading would have released some 1,652 locomotives not needed for their proffered lines. They further argue that, when combined with the units released by the other Transferors, this supply might have risen to 2,291 locomotives. Although the figures may be somewhat inflated, a lesser supply would have had a significant effect on the marketability and value of all rolling stock—especially older units such as CNJ's.

CNJ has failed to address the question of market demand. It assumes marketability for reuse with respect to all models, but makes no serious attempt to identify potential purchasers who might have paid the prices which CNJ suggests. The other Transferors would have had enough old units of their own for yard use. Certain railroads in the south or west might have been interested, but even if that market existed, CNJ's units would have had no competitive advantage.

The four EMD SW1 switchers built between 1939 and 1942 and two EMD NW2 switchers built in 1942 would have been between 34 and 37 years old in 1976. They had very few, if any, years of useful service remaining in 1976. With only 600 (SW1) and 1000 (NW2) horsepower, these units were underpowered by current standards. The Wyer Dick study made in 1968 for CNJ appraised these units at scrap value; it is not plausible that in 1976 a purchaser would have paid a reuse premium for any of them.

In the next category are fifteen EMD SW7 and SW9 switchers built between 1950 and 1952. These 1200 horsepower units were between 24 and 26 years old in 1976. In 1968, when these units were sixteen to eighteen years old, Wyer Dick found that they could have been sold for a total of $333,000, or $22,000 each. CNJ now contends that eight years later, with other bankrupt railroads abandoning many of their lines, these same units would have been sold for $60,000 each. That figure is unreasonable. We find that the valuation of CNJ's diesel locomotives and freight cars contained in the 1968 Wyer Dick study (Account 52) is credible and entitled to considerable weight. Prepared pursuant to orders from the CNJ reorganization court, the study was carefully executed—taking over two years and 2900 hours to complete and supported by thousands of pages of detailed workpapers. Each of CNJ's locomotives and freight cars was individually evaluated. This study represents the most thorough evaluation of CNJ's equipment in the record. While the Wyer Dick study placed its primary emphasis on age when evaluating

CNJ's locomotive fleet, the study also considered such factors as usage, potential for rebuilding and the condition of major components in making its evaluations. Weighing all factors, we find that eleven units built in 1951 and 1952 would have sold for reuse at Wyer Dick's price of $22,000 each. The four built in 1950 would only have been sold for scrap.

CNJ also owned eleven EMD GP7, 7P road switchers built in 1952. Wyer Dick determined in 1968 that there was a resale market for them at a price of $30,000 each. CNJ's contention that in 1976 they could have sold for $90,000 each is not reasonable. The GPs argue that all would have been sold for scrap. We find that six of the eleven switchers would have been sold for scrap, and the other five could have sold for $30,000 each over a period of time.

CNJ owned 26 ALCO RS2 and RS3 road switchers built between 1950 and 1953. For a variety of reasons, these were among CNJ's least desirable models. First, ALCO ceased domestic production in the late 1960s, making replacement parts difficult to obtain. Second, the unrebutted testimony of GPs' witness George P. Leilich shows that ALCO units are "significantly more expensive to maintain and operate than comparable locomotives" such as EMDs. Third, CNJ's own witness (Dunn) stated that EMD models are preferable to ALCO models because "they're better built, crews like them better and maintenance practices over the years have shown that the EMDs are less costly to maintain." Dunn also conceded on cross-examination that these 26 ALCO locomotives would have been cannibalized for spare parts rather than sold for reuse, 35 GPs Supp. App. at 152. Finally, the Wyer Dick study valued these units at scrap in 1968 and there is no reason to conclude that over the course of the next eight years these locomotives had become any more attractive to a purchaser for reuse. They should be valued at scrap.

The twelve high powered EMD SD35 road freight locomotives built in 1965 could have been sold for reuse. CNJ contends that the twelve locomotives were worth approximately $2.9 million;

the GPs' figure is just under $1.6 million. Wyer Dick's careful study appraised these locomotives at $2.18 million. We adopt its conclusion.

The final category embraces eight MD SD40 road freight locomotives built in 1967. The parties agree on marketability for reuse but differ on price. The CNJ valuation is approximately $2.16 million; the GPs' figure is $1.25 million. These 3000 horsepower locomotives, CNJ's newest and highest powered units, were unquestionably the fleet's single most valuable model. The Wyer Dick study appraised these locomotives at $1,971,000, a figure considerably closer to CNJ's valuation than the GPs'.[82] It represents the best choice under the circumstances.

B. *Freight Cars and Cabooses*

After locomotives, CNJ's 753 conveyed freight cars and cabooses represent the next most valuable equipment account. CNJ contends that 257 of its cars (including 29 cabooses) would have been sold for reuse, and that the conveyed fleet should be valued at $2,085,000. The GPs argue that only eleven cars (those fifteen years old or less in 1976) would have been sold for reuse, and that the conveyed fleet should be valued at $937,000.

The GPs contend that in the absence of the Rail Act the market would have been glutted with used rolling stock withdrawn from service by the other Transferors; they assert that Penn Central, Erie Lackawanna, and Reading would have released some 55,040 freight cars not needed for their proffered lines and that, combined with the units released by the other Transferors, the supply might have risen over 77,000. Although the court does not adopt these figures, the problem of market glut in the absence of the Rail Act cannot be ignored.

The GPs also argue that CNJ's conveyed equipment was undesirable to other railroads because of its advanced age, high maintenance cost, and poor reliability. This is supported to some extent by the evidence that CNJ's conveyed freight cars were in the worst condition of any of the Transferors.

Appendix J

The normal life expectancy of boxcars, gondolas, and hoppers is 30 years; apart from the cabooses, this dispute primarily concerns 224 cars between nineteen and twenty years old in 1976. On the basis of age alone, these units are not too old for reuse.

CNJ's strongest argument is that in the mid-1970s there actually were numerous sales of freight cars older than fifteen years at prices in excess of scrap. CNJ has produced data showing that from 1973 to 1976, some 700 freight cars about thirty years old were sold for reuse. The majority of the cars sold were gondolas, and the prices ranged from $2,100 to $4,600. The GPs have not challenged the accuracy of these data.

Although CNJ's market data indicate that some of its older cars would have been marketable for reuse in 1976, CNJ's appraisal does not take into account the fact that its equipment would have been competing in the market with equipment of other Transferors; for this reason a substantial downward adjustment is necessary.

The first category contains 46 boxcars built between 1956 and 1957. CNJ has introduced evidence of sales for reuse of some 700 older freight cars, but none of those cars sold were boxcars. Solvent railroads would have been especially hesitant to purchase used boxcars or flatcars because during the previous decade the trucking industry had permanently captured much of the traffic formerly carried in cars of that type. The lack of usefulness of this type of car is further evidenced by workpapers contained in CNJ's appendix concerning sales of freight cars. The vast majority of sales cataloged were of gondolas. Only sixteen boxcars were mentioned. Four of these were sold for scrap, and one was sold for only $2500.00. The eleven sold for reuse were not only considerably younger than the boxcars conveyed by CNJ, but had been extensively modified for coil aluminum service. *See* 3 CNJ App. 835-39. The CNJ boxcars should be valued at scrap.

CNJ conveyed 51 gondolas, of which 47 were built in 1957 and four were built in 1965. The GPs do not dispute the marketability of the four newer units. CNJ's contention that there was a reuse market for the older units is buttressed by two important facts. First, CNJ has produced a substantial amount of market data showing sales of used gondolas from 1973 to 1976. In most cases, the units sold were ten years older than CNJ's were in 1976. Second, both the Wyer Dick and DeLeuw Cather studies classified CNJ's gondolas for reuse and assigned them the highest unit value of any car in its fleet ($5,330 and $4,185, respectively).[83] On the basis of these showings, we find that in 1976, CNJ could have sold all of its gondolas at the Wyer Dick price of $5,330 each. This price is consistent with the sales prices reported for gondolas of similar age in the GPs' own workpapers. *See* workpapers USR 92051-00000004-14; 3 CNJ App. 835-39.

CNJ also owned and classified for reuse 131 covered hoppers built in 1957. These hoppers were also classified for reuse by Wyer Dick and DeLeuw Cather, but both of these appraisers assigned them the lowest unit value of any resalable model ($3,453 and $4,433, respectively). CNJ's market data shows that in 1976, 100 twenty-eight year old covered hoppers were sold for $3,095 each. In the light of the applicable market data and the appraisals of Wyer Dick and DeLeuw Cather, we find that eighty-seven, or two thirds, of these units would have been sold for reuse at an average price of $3,453 each.

In the last category are 29 cabooses built in 1942 and valued by CNJ at $4,000 each. These units were 34 years old in 1976, were heated by pot-bellied stoves, were not air-conditioned, and lacked toilet facilities. Not only were they of outdated design, but they would have come on the market at a time when newer, more modern cabooses were readily available. Also, cabooses are normally built to conform to the purchaser's specific work rules, and CNJ's cabooses would not have been suitable to many potential purchasers. CNJ argues that Conrail's conversion program to renovate and standardize conveyed cabooses demonstrates the

value of these units, but the cited testimony does not support CNJ's position. Accordingly, they should be valued as scrap.

C. *Outstanding Equipment Obligations*

There is also dispute between the parties on the matter of outstanding equipment obligations. CNJ claims that these obligations total $1,356,000 while the GPs claim an outstanding balance of $1,624,000. These obligations stem from March 31, 1976 outstanding balances on certain locomotives and freight cars conveyed by CNJ which were subject to Conditional Sales Agreements.

In determining the amount of its outstanding equipment obligations, CNJ utilized the information contained in its own books and records used for the purpose of making its March 31, 1976 R-1 report to the Interstate Commerce Commission. The GPs, on the other hand, utilized a combination of their own hand calculations and computer printouts to calculate this figure, Murphy workpapers, 3 CNJ App. at 996-1011. We find that CNJ's figure is accurate and contains none of the flaws of the GPs' figures. For example, the GPs charge CNJ $35,135 in interest for Conditional Sales Agreements 3 and 4 which both sides agree would have been disaffirmed. Also, while the Conditional Sales Agreements call for level semi-annual payments, the GPs erroneously assumed declining payments for CNJ Sales Agreements 1 and 2. Workpaper USRA 9206500000032 and 00000028, 3 CNJ App. at 1011, 1007. Therefore, we adopt CNJ's figure for Outstanding Equipment Obligations.

D. *Other Machinery and Equipment*

The remaining seven equipment classifications are Roadway Machines, Roadway Small Tools, Shop Machinery, Power Plant Machinery, Passenger Cars, Work Equipment and Miscellaneous Equipment. CNJ values these items at a total amount of

$1,743,000 and the GPs at $649,000. Each of these classifications is discussed below.

1. *Roadway Machines*

The larger items in CNJ's Roadway Machines account include units such as Caterpillar Road Graders, Nordberg Hydrospikers, Kershaw Tie Cranes and Fairmont Rail Lifters, all of which are used by railroads for the purpose of maintaining track and roadbed. This account also includes smaller items such as rail drills, plate placers, tie saws, and rail saws. The GPs' valuation of these roadway machines is $400,000. CNJ values this asset category at $997,000. We find the GPs' valuation the more credible, and we therefore adopt it.

The testimony of Richard Browner, former CNJ Superintendent Work Equipment, was relied on by both sides and is by far the most detailed and persuasive evidence on this account. CNJ asserts that its valuation methodology was "based in large part" on 1974 meetings between Dunn and Browner in which Browner is said to have provided estimates of the market values of CNJ's roadway machinery. Browner's unrebutted testimony, however, is that these discussions did not concern market value, but only "original" cost and in some cases replacement cost. In its reply brief, CNJ failed to present a satisfactory explanation of how it might have reached its determinations of market value.

Moreover, Browner's testimony is not supportive of CNJ's contentions. Browner's testimony reveals not only that CNJ's roadway equipment was put to heavy use and was subject to rapid depreciation, but also that much of it was old and, in some cases, obsolete. Although some of the larger items could be maintained to last as long as 20 years, as CNJ contends, this does not indicate marketability. It is clear that much of CNJ's equipment was rebuilt and kept operational well beyond its expected service life simply because CNJ could not afford to replace it. Even though such equipment was adequate to meet CNJ's continuing needs,

the evidence is persuasive that it would not have been attractive to prospective purchasers in a competitive marketplace.

2. *Roadway Small Tools*

The next account item concerns CNJ's roadway small tools, which CNJ's Dunn valued at $14,000 and the GP's Leseur at $2,000. This account contained such items as shovels, sledge-hammers, pick axes, small power tools, air compressors and table saws for which there is a large ready market both within the railroad industry and without. CNJ's method of valuing these tools was as thorough and conservative as can be expected given the wide variety, scattered locations and relatively low value of the items in this account. CNJ took the $52,000 book value for these items, and trended them using the Bureau of Labor Statistics Indices to obtain estimated 1976 replacement costs. This figure was reduced by 50% to reflect depreciation and condition and then reduced another 90% to reflect the high cost of disposition due to the widely scattered locations of the tools on the railroad and the difficulty of collecting them for sale. CNJ Opening Brief at 449-50; 3 CNJ App. at 556-7, 651.

3. *Shop Machinery*

Evaluating this asset category is particularly difficult as CNJ never maintained shop machinery valuation records in any reliable manner. CNJ valued its shop machinery at $379,000, while the GPs assigned a value of $117,750 to this asset category. Again we adopt CNJ's valuation as we find it conservatively done and inherently credible. This asset category contains forklift trucks, lathes, drill presses, pipe threaders, small tools and other machinery "commonly found in any industrial shop". 3 CNJ App. at 657. Due to the lack of adequate records, CNJ witness Dunn used the 1969 inventories made by Wyer Dick eliminating machines retired in the interim and adding new ones. This list

was then checked against a list prepared by the mechanics department in 1973. After this inventory list was developed, CNJ used the same basic methodology for determining the value of this asset category as it did for Roadway Small Tools. The 1976 replacement costs were reached by trending the indices of the Bureau of Labor Statistics. These figures were then reduced by 75% to reflect possible theft, collection costs, general depreciation and other factors. Machines that were found to be "functionally obsolete or out of service" were deleted from the inventory. 3 CNJ App. at 655. The GPs' lower figures are based on a variety of factors including CNJ's "heavy usage" of the machines, the limited resale value to other railroads and a strong glut effect on the used machinery market. 3 CNJ App. at 934, 964-69. We reject these contentions. There was no evidence that CNJ used these machines more than one eight-hour shift per day. Furthermore, these machines had wide utility outside the railroad industry and therefore any glut effect would have been greatly reduced.

4. *Power Plant Machinery*

Power plant machinery refers to power plant equipment in Elizabeth, New Jersey. The GPs failed to offer a valuation for this account. We therefore adopt the CNJ figure of $4,000. CNJ valued this asset as scrap, assuming no resale value. 3 CNJ App. at 564.

5. *Passenger Train Cars*

CNJ conveyed four passenger train cars. The GPs and CNJ have both placed a total value on these cars of $6,000, which we adopt.

6. *Work Equipment*

The GPs valued CNJ's work equipment at $88,700 and CNJ valued this asset category at $290,000. This difference is largely due to the fact that the GPs classified all of these items (primarily

service cars and locomotive cranes) as scrap. CNJ classified 35 items as scrap for a total value of $59,500 and 21 items for resale at a combined value of $230,500. CNJ persuasively contends that the GPs' valuations of this asset category are placed in doubt by the inconsistencies between its prices for CNJ's work equipment and the prices placed on similar, though older and smaller equipment of other Transferors. CNJ Opening Brief at 457. The GPs valued 28 Diesel Locomotive Cranes of the Erie Lackawanna at $25,000 but classified CNJ's 7 newer and larger capacity cranes as scrap. *See* 3 CNJ App. at 736.

The remaining differences between the two parties are minor except for the valuation of two "air dumps." CNJ assigned a value of $6,000 each to these items. The GPs value these items as scrap but, as a GPs' workpaper, USR 9205100000015; 3 CNJ App. at 840, indicates, the CNJ figure is entirely credible. *See* CNJ Opening Brief at 458. Thus we adopt CNJ's estimate of $290,000 as the value of its work equipment.

7. *Miscellaneous Equipment*

The GPs value CNJ's miscellaneous equipment at $29,700 while CNJ values this equipment at $53,000. This asset category contains 12 trucks and a small amount of truck equipment which the parties agreed was saleable for reuse. While we readily admit that precise, item by item valuations are often not possible for large asset categories consisting of many disparate items, in this instance there was no reason for the GPs to lump together these few items into three categories ("Automobiles and Trucks," "Special Equipped Trucks" and "Hi Rail Equipment"). CNJ's analysis, which was done item by item, is inherently more credible and we adopt it. *See* 3 CNJ App. at 672. CNJ witness Dunn estimated resale values ranging from $400 each for CNJ's three 1968 Dodge vans to $15,000 each for two 1974 radio-equipped Ford dump trucks which cost $20,000 each in 1974.

We, therefore, find the liquidation value of CNJ's equipment, after deduction for related obligations, to be $6,053,041. The details are set forth in the following tables:

Locomotives

Description	*Year Built*	*No. of Units*	*Unit*	*Total*
EMD Switcher SW1	1939-42	4	9,100	36,400
EMD Switcher NW2	1942	2	9,100	18,200
EMD Switcher SW7	1950	4	9,100	36,400
EMD Switcher SW9	1951-52	11	22,000	242,000
EMD Road Switcher GP7, 7P	1952	11	5 × 30,000 6 × 9,100	150,000 54,600
ALCO Road Switcher RS2	1950	8	9,100	72,800
ALCO Road Switcher RS3	1951-53	18	9,100	163,800
EMD Road Freight SD35	1965	12	182,000	2,184,000
EMD Road Freight SD40	1967	8	246,375	1,971,000
		78		4,929,200

Freight Cars & Cabooses

Description	*Year Built*	*No. of Units*	*Unit*	*Total*
Box Cars	1957	34	1,200	40,800
Equipped Box Cars	1956-57	12	1,200	14,400
Gondolas	1957-65	51	51 × 5,330	271,830
Covered Hoppers	1956-57	131	87 × 3,453	300,411
			44 × 1,400	61,600
Cabooses	1942	29	1,100	31,900
		257		720,941
Scrap value of remaining cars		496		612,900
		793		1,333,841

Appendix J

Other Equipment Accounts

Description	
Roadway Sm. Tools	14,000
Roadway Machinery	400,000
Shop Machinery	379,000
Power Plant Machinery	4,000
Passenger Cars	6,000
Work Equipment	290,000
Misc. Equipment	53,000
	1,146,000

Summary

Locomotives	4,929,200
Freight Cars and Cabooses	1,333,841
Other Equipment Accounts	1,146,000
	7,409,041
Equipment Obligations	1,356,000
	6,053,041

VI.

DEDUCTIONS FROM VALUE OF FACILITIES AND EQUIPMENT

A. *Winddown Costs*

Winddown is described by the GPs as

> a discrete phase of activity that any operating railroad seeking to withdraw completely from the rail business would have to go through. During winddown the transferors would have issued embargoes or cancelled tariffs, completed the handling of the remaining freight traffic they were required or chose to accept, terminated passenger operations, and begun the processes of clearing their lines of foreign cars and assembling their own rolling stock for sale after it was no longer needed for rail service. At

> the same time, they would have accelerated preparations to dispose of assets—collecting, inspecting, and inventorying equipment, materials and supplies, advertising and pursuing contacts with potential buyers—and would have made sales whenever possible. GPs Opening Brief at O-3.

The GPs contend that CNJ would have had to begin winddown on April 1, 1976, when permission to abandon rail service would have been received. Notices could then be sent out informing the public that all freight and passenger service would cease within a few weeks. Revenues would decline sharply during winddown, but operating costs could not be reduced in proportion to this fall. According to the GPs' consultant L. Michael Kenny, net operating losses could be minimized by conducting winddown in as brief a period as possible, with one month the minimum time in which an operation of CNJ's size could be halted. The GPs calculate that if CNJ had received permission to abandon effective on April 1, 1976, it would have incurred net operating losses of $744,803 during that month, of which $703,583 would be allocable to the conveyed assets. This amount, the GPs contend, should be deducted from the total liquidation value of the conveyed assets to arrive at net *realizable* liquidation value.

CNJ responds that no such expense would have been incurred after April 1, 1976 since all rail services would have ceased by that time. Winddown activities could have been conducted in prior months, particularly during the months immediately preceding April 1, 1976 with employees planning and preparing for a shutdown on that date while freight and passenger service continued in a diminishing degree.

In other words, the GPs assume a railroad operation running full tilt on March 31, 1976, with all aspects of the winddown remaining to be done after that date, whereas CNJ assumes a "dead railroad" on April 1, 1976, with the winddown already completed. The GPs appear to base their argument for a post-April 1, 1976 winddown on the assumption that CNJ could not

have known precisely when the ICC would permit abandonment and would have had to operate normally until the permission to abandon was obtained. CNJ, on the other hand, contends that it would have known long prior to April 1, 1976 that its abandonment could commence on or about that date.

As we have stated elsewhere with respect to sales of real estate, we consider CNJ's assumption to be the more plausible. In the *Rail Use Opinion,* we found that in the alternative scenario all "proposed sales and abandonments probably would have been completed on, but not before, April 1, 1976." 531 F. Supp. at 1294. Congress would likely have established some such date as the deadline for ICC action on all conveyances and abandonments. *Id.* at 1304. Hence CNJ is correct in supposing that the abandonment date would have been known in advance. We conclude that under the alternative scenario rail operations would not have continued on CNJ's conveyed properties for any significant period after April 1, 1976, and thus that the net operating losses due to winddown after that date would not have been substantial.

It may be true, on the other hand, that execution of a winddown program prior to April 1, 1976, would have augmented CNJ's losses for that period, despite CNJ's contention that the final weeks would have witnessed a surge of traffic which shippers would have wished to move while rail service remained available. But there are several reasons why we cannot translate such increased losses into an expense deductible from the otherwise realizable value of the conveyed properties. One is that the GPs, preferring to stake all on their position that the winddown would not have begun until April 1, 1976, have proffered no evidence of the extent to which losses prior to April 1, 1976 would have been augmented if CNJ had chosen to accomplish the winddown, in whole or in large part, before that date. Another is CNJ's claim that augmented losses prior to April 1, 1976, if any, would have been offset at least in part by federal interim assistance. *See Rail Use Opinion,* 531 F. Supp. at 1299. The GPs counter that federal subsidies would have been offered only to Transferors committed

to preserving rail service on their lines and that once CNJ's hypothetical resolve to abandon rail service was known, interim financial aid would have been cut off entirely. While there is some conceptual plausibility in this argument, we are not so sure that Congress would have made this distinction rather than provide a subsidy for all affected carriers[84] until any hope of continued rail service was lost. Finally, increased losses in the period prior to April 1, 1976 are not properly viewed as an expense which CNJ would have incurred in disposing of the property taken from it on that date. They would have resulted rather in a depletion of the current assets retained by the CNJ Trustee. CNJ could argue that such a depletion, if not reimbursed, might have qualified as a claim for compensable unconstitutional erosion, *see CUE Opinion,* 439 F. Supp. at 1356—against which the GPs might argue that, to the extent that the Rail Act relieved CNJ of such expenses by providing for continued rail service after April 1, 1976, this would constitute an element of "value of other benefits", *see CMV Opinion,* 445 F. Supp. at 1042-43, a subject which we have deferred for subsequent consideration if that should become necessary. It is greatly to be hoped that, as was the case with the many settlements we have approved, the parties can agree that CUE and VOB cancel each other out. In any event, arguments as to the effect of a hypothetical winddown prior to April 1, 1976 are not appropriate for consideration here.

The GPs' winddown deduction will therefore not be allowed.

B. *Liquidation Organization and Disposition Costs*

The GPs insist that, in order to calculate the net realizable value of CNJ's conveyed assets, a deduction must be made for all the expenses required to sell the assets. In other portions of this opinion we adopt the GPs' general position with respect to the costs of holding and selling CNJ's conveyed real estate. We have reduced the amount of the claimed deduction, and have considered and rejected, on the facts of this case, the GPs' proposal for a deduction of $703,583 for "winddown" expenses. We deal here

with the GPs' proposed deductions for the costs of collecting, sorting, and safeguarding the conveyed facilities and equipment prior to sale, making emergency repairs, and negotiating sales of these assets. We also consider their contention that other costs of liquidating CNJ's total operation, such as settling interline accounts, closing out accounts receivable and payable, adjusting claims, and all other legal, accounting and management tasks involved in a liquidation, should be deducted.

CNJ contests the propriety of making any deduction from the sale price of its assets for the expenses of disposition and liquidation. The bases for this are (1) that its conveyed properties were not in fact dismantled and sold in a nonrail use liquidation, and (2) that they would not have been dismantled in the absence of the Rail Act since New Jersey would have bought them for continued rail use. The former argument requires little discussion since the question in any condemnation valuation is what the properties would have realized in the absence of condemnation. The latter argument is readily answered once CNJ's perception theory is rejected. New Jersey would have paid, or been required to pay in condemnation, only what CNJ could have obtained by liquidation. We proceed therefore to CNJ's alternative argument, in which we find considerable merit, namely, that the GPs' estimate of $5,434,794 for the deductions here under consideration is far too high.

It is unfortunate that the GPs did not develop independent estimates for the disposition and liquidation costs here considered, as they did for the asset values themselves, but relied instead on the study commissioned by CNJ's former Trustee from transportation consultants Wyer, Dick & Co. to value the railroad and its affiliated lines as of June 30, 1968. This study estimated the liquidation value of non-real estate assets at $40,067,500 and related liquidation expenses at $3,243,600[85] (approximately 8.1% of liquidation value). Russell F. Murphy, a transportation consultant and former financial officer of USRA, testified for the GPs that he adjusted Wyer Dick's liquidation expense figure for

inflation, the decrease in CNJ's size between 1968 and 1976, and possible double-counting, then allocated the resulting figure between CNJ's conveyed and retained properties, and discounted to present value as of April 1, 1976. Murphy's result, $5,434,794 in facilities and equipment disposition and liquidation costs, was approximately 32% of the GPs' estimated facilities and equipment liquidation value of $16,758,000. This fourfold increase in the ratio of disposition and general liquidation expenses to total non-real estate assets being valued[86] prompted CNJ to offer the testimony of Charles J. Meyer, now president of Wyer, Dick & Co. and principal author of the 1968 study, criticizing Murphy's adjustments at nearly every point. We here scrutinize Murphy's work for the flaws Meyer suggests, but do not subscribe to Meyer's and CNJ's broader conclusion that the potential flaws in Murphy's analysis make realistic adjustment of Wyer Dick's 1968 study impossible.[87]

1. *Adjustment for Inflation*

Murphy took as his starting point Wyer Dick's estimate of $3,803,050[88] in liquidation expenses for CNJ and nine small affiliated lines. These expenses were largely attributable to labor costs, and most of the remainder, for supplies, space, and fringe benefits, had been computed as a percentage of labor costs. Murphy adjusted this figure upward for inflation between June 30, 1968, and April 1, 1976, calculating item by item on the basis of cost indices for railroads in the eastern United States. Murphy's result was $7,467,612, an increase of 96.4% over the 1968 figure.

CNJ disputes the increase first on the ground that whatever the other railroads were doing, CNJ substantially delayed wage increases beginning in 1971 and would have frozen wages altogether in the alternative scenario, and therefore should not be held to an industry-wide inflation index that showed wages rising 98% between 1968 and 1976. CNJ refrained from submitting evidence, presumably readily available to it, showing what wages the employees who would have been engaged in liquidation were

actually receiving on April 1, 1976, and thereafter. The GPs, on the other hand, submitted an exhibit showing that CNJ had incurred wage increases of 53% between January 1971 and March 1974, 39 GPs Supp. App. at 188. We thus have no sufficient basis for scaling down Murphy's inflation adjustment by any determinable amount for the reason here considered.

CNJ's other argument against Murphy's inflation adjustment is that while Murphy assumed that nonproffered lines of the other Transferors would be disposed of for nonrail use, he made no study of the number of railroad laborers left unemployed by such dispositions and concluded that CNJ's labor costs over the disposition period would not be affected by any ensuing "labor glut". This contention, while rather amusing as an effort by CNJ to hoist the GPs by one of their own petards, is not persuasive. The "labor glut" would not occur until April 1, 1976, and Murphy made no upward adjustments for inflation after that date. Any "glut" in the labor market thereafter might have slowed the rate of further inflationary increase, but would hardly have driven wages below the April 1, 1976 levels applied by the GPs throughout the disposition period. Finding no error in the GPs' inflation analysis within our ability to correct from the evidence, we accept Murphy's adjustment of Wyer Dick's figure upward to $7,467,612 to account for inflation from June 30, 1968, to April 1, 1976.

2. *Adjustment for Reduction in Size of CNJ by 1976*

Murphy next considered the decrease in CNJ's property and assets from 1968 to 1976. From mid-1968 to March 1976, CNJ curtailed its operations substantially (ceasing all operations in Pennsylvania), eliminated its affiliated lines, reduced its payroll from 3,536 employees to 1,779, and disposed of 67% of its rolling stock. Its real estate and amount of track showed less of a decline, from 481 road miles (for CNJ and affiliated lines) in 1968 to 327 in 1976, and from 1,108 track miles in 1968 to 680 in 1976.

Murphy made no reduction in the $7,467,612 disposition and liquidation expense figure for this decrease. It was his conclusion that Wyer, Dick & Co. "significantly understated" the costs of liquidating the larger CNJ system in 1968 and that the staffing of executive, legal, accounting, transportation, engineering, mechanical, purchasing, security, labor relations, and claims departments in the 1968 study was barely adequate to "carry out an orderly and efficient liquidation" of a railroad of CNJ's reduced size in April 1976, Murphy Testimony, February 16, 1982 at 20. It seems unfortunate that upon making this judgment Murphy did not begin afresh; certainly his approach of using the Wyer Dick study where it suited and rejecting it where it did not calls for careful scrutiny on our part.

Murphy's "best example" of inadequate staffing in the Wyer Dick study was the maintenance-of-equipment staff of five (three superintendents and two clerks) for the first six months of disposition, with one superintendent and one clerk remaining in the second year. He doubted that so small a staff would be adequate to sell off the locomotives and other rolling stock CNJ conveyed in 1976, given the repair functions he expected they would have to perform. However, as CNJ's witness Meyer demonstrated and the GPs have conceded, Murphy was in error when he supposed that this staff would have had repair duties. The Wyer Dick study made it quite clear that the costs of this mechanical department staff did "not include estimated equipment repair costs", which were included elsewhere in the study. The staff envisioned in Wyer Dick's study would have adequately handled the maintenance-of-equipment crew's remaining duty, the sale of locomotives and freight cars for reuse, and the Purchasing & Stores staff would have assisted in sales for scrap value.

Murphy's other examples of inadequate staffing are Wyer Dick's inclusion of a single train crew for gathering loaded cars from and returning empty cars to the dismantlement work trains and the inclusion of a maintenance-of-way staff of six to handle wreck-train service and emergency track maintenance. Again

Meyer pointed out that Wyer Dick made ample provision for these functions in the form of a dismantlement force consisting of four work train gangs (revealed in Wyer Dick's workpapers to amount to 116 persons).

We find no specific support, therefore, for Murphy's conclusion that "excessively" tight staffing throughout Wyer Dick's study made its personnel tables appropriate for liquidating a much smaller CNJ in 1976. On the other hand, we recognize that a railroad cannot employ fractions of persons or expect to find individuals with expertise spanning several departments. According to the summary of Wyer Dick workpapers in Appendix 4A, pp. 4A-21 to 4A-24 of Murphy's testimony, most staff functions were to be performed by single individuals for varying lengths of time. Still, with a 67% reduction in rolling stock and a 39% reduction in track miles, a 40% reduction in personnel and a proportionate reduction in other expenses would seem reasonable. We thus carry to the next round of adjustments in Murphy's testimony the reduced liquidation cost estimate of $4,480,567.

3. *Adjustment for Division Between Conveyed and Retained Properties*

Murphy's sequence of adjustments would next have us subtract those costs that would otherwise be "double-counted" because of inclusion elsewhere in the parties' Stipulation Regarding the Cost of Dismantlement and Transportation for Conveyed Trackwork dated December 11, 1981, and the GPs' proofs. Because all the costs addressed elsewhere in the stipulation for track dismantlement, real estate selling costs, and so forth are confined to CNJ's conveyed assets, and the figure of $4,480,567 has not yet been allocated between conveyed and retained assets, to subtract for double-counting at this point would be a clear error in computation. We therefore proceed directly to the allocation between conveyed and retained assets. We begin by noting that Murphy based his allocation of total liquidation costs solely on the proportions of track (92.1%, by track mile), rolling stock (100%), and

real estate (78.6%, by acre) conveyed by CNJ. This resulted in an overall attribution of 85.6% of the liquidation costs to conveyed properties.[89]

Meyer testified on behalf of CNJ that the Wyer Dick study included many other categories of assets, all of which were retained by CNJ after April 1, 1976. Management of liquid assets, collection of accounts receivable, and liquidation of CNJ's investments in its affiliated lines are among functions left out of an allocation formula which focuses solely on proportions of real estate, rolling stock, and track. To the extent, therefore, that liquidation costs are attributable to these assets, Murphy's methodology misallocated them. We agree that a different allocation is necessary and conclude that the record permits the following division of Wyer Dick's valuation estimates between "conveyed" and "retained" asset types:

	1968 Value	*"Retained"*	*"Conveyed"*
Current Assets	12,371,200		
Materials & Supplies			2,018,200
Other Current Assets		10,353,000	
Special Funds	1,037,500	1,037,500	
Investments	9,187,600	9,187,600	
Properties			
Real Estate (78.6.%)	56,255,500	12,038,667	44,216,823
Rolling Stock (100%)	6,747,800		6,747,800
Track, Etc. (92.1%)	7,749,700	612,226	7,137,474
Other Assets & Charges	2,972,700	2,972,700	
TOTAL	96,321,990	36,201,693	60,120,297
(Percentage)		(37.6%)	(62.4%)

By this calculation, 62.4% of gross liquidation value was accounted for in Wyer Dick's study by asset and property categories corresponding to those conveyed in 1976, rather than the 85.6% estimated by Murphy using divisions of real estate, rolling stock and track alone. It is true that some of Wyer Dick's disposition and liquidation costs, such as mechanical and engineering

staffs, would be tied more or less completely to the facilities and equipment assets, while other costs, such as those for legal work (at $2,068,900, after adjustment for inflation, the largest single item in the study), accounting staff, and top management, are shared more evenly between these and the various asset categories wholly retained by CNJ, or even, as CNJ argues, are tilted more heavily toward the latter. Considering the breakdown of asset values and of liquidation expenses, we find that an allocation of 62.4% of total expenses to CNJ's properties and assets conveyed on April 1, 1976, is proper on the basis of the evidence. We therefore carry forward $2,795,874 to the next stage of adjustment.

4. *Adjustment for Double-Counting*

We take up now the elimination of those costs of disposition and liquidation already accounted for in the stipulations and proofs submitted by the parties, as well as other corrections proposed by the parties in arriving at a proper estimate of liquidation expenses for the conveyed properties. Murphy deducted $243,655 attributable to real estate disposition costs already calculated by Tesh, $163,354 duplicative of the GPs' winddown estimate, $254,606 in transportation and train costs post-dating the end of the stipulated dismantlement period, and the whole of the expense allocated to the Trustee's Office, $1,030,561. When the last of these figures is reduced to the portion attributable to conveyed properties, a total of $1,304,685 would be subtracted from the figure carried forward, which would leave $1,491,189 in liquidation expenses net of double-counting. However, our disallowance of winddown expenses requires that Murphy's deduction of $163,354 for double-counting expenses of clerical forces and train costs required to return freight cars of other railroads at the end of winddown must be restored, making our running total $1,654,543.

CNJ, of course, does not take issue with these subtractions, but does contest Murphy's two further "corrections" adding

$1,885,077 for management costs after the fifth year of liquidation activity and $333,705 for an increased security staff to deter pilferage and vandalism in the first year. As to the former, the expenses would relate solely to sale of remaining real estate, and have been rejected in another portion of this opinion. Any coordination of the few remaining in-house real estate sales personnel could have been handled by the Trustee's Office, for which the GPs correctly made no deduction. With respect to the latter correction, CNJ argues that an increase in security staff over that provided in Wyer Dick's study would not be warranted, especially in the light of the decrease in CNJ's assets between 1968 and 1976. Despite this we believe some increase in Wyer Dick's figure was warranted and allow an added $175,000 for security costs. Our figure for liquidation expenses is increased, therefore, to $1,829,543.

CNJ contends further that many expenses arguably covered by the Trackwork Dismantlement Stipulation are duplicated in expenses included in the Wyer Dick study and Murphy's security cost correction. The Stipulation, however, while providing for $5,400,000 in trackwork dismantlement and transportation costs, states in paragraph 4 that it does not cover the costs of:

> An engineering group to oversee the entire dismantlement process; a transportation group; maintenance of equipment group; personnel and payroll group; financial and accounting support; legal and management services; security forces; sales forces and expenses (other than freight); clerical forces above the field dismantlement level; taxes (other than payroll taxes for field dismantlement personnel), or the separate activities necessary for the winddown of rail operations.

In response, CNJ points to paragraph 7 of the Stipulation:

> The parties agree that the stipulated cost of dismantlement and transportation would have been the amount stated [$5,400,000] regardless of the composition,

> number, kind or *employer* of work crews that would or might reasonably and feasibly have been used to dismantle trackwork. [Emphasis supplied.]

CNJ argues on the basis of paragraph 7 that the Stipulation contemplates a dismantlement by a contractor who purchases the trackwork in place and absorbs all supervision, management and clerical costs. This interpretation would fly in the face of paragraph 4, rendering all its exclusions meaningless, and would moreover require recalculation of the sale value of track material in order to compensate the contractor for his additional costs and risks. We reject CNJ's contentions of double-counting based on the Trackwork Dismantlement Stipulation.

Through Meyer's testimony CNJ made two larger points that can be treated as variations on the double-counting argument. The first is that the liquidation value of CNJ's conveyed properties should not be decreased by costs duplicating those CNJ has already incurred in the real world to wind up its rail operations on the retained properties. CNJ asserts that it has settled interline accounts, collected its receivables and paid its payables, adjusted claims against it, managed its liquid assets, and maintained its books and records at its own expense while undergoing reorganization. Although CNJ has not provided an estimate of these expenses, it contends that they duplicate most of the legal, accounting, and managerial functions assigned in the Wyer Dick study. At bottom, this argument on CNJ's part is that the costs of winding up corporate affairs and going out of business, as opposed to the direct costs of collecting and selling off the conveyed assets and properties, should be allocated wholly to the retained properties because in fact CNJ accomplished all these tasks on its own. Our allocation of only 62.4% of the total estimated costs of liquidation to the conveyed assets takes sufficient account of CNJ's argument. CNJ could not have escaped substantial additional legal, managerial, and accounting expenses

in selling its conveyed assets in a nonrail use liquidation of the entire railroad.

CNJ's second broad double-counting argument is that the expenses it actually incurred in conveying its properties to Conrail, including the expenses of litigating this action, should offset any deduction for disposition costs and liquidation expenses. Such items are not appropriate for consideration in determining what CNJ could have obtained by sale of the conveyed properties for nonrail use. As the Supreme Court has said, "[a]ttorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain", *Dohany* v. *Rogers*, 281 U.S. 362, 368 (1930); *United States* v. *Bodcaw Co.*, 440 U.S. 202 (1979).

5. *Adjustment to Present Value*

Murphy's final adjustment, one welcomed by CNJ, is the reduction of the liquidation organization and disposition costs to their present value on April 1, 1976. Applying the stipulated discount rate of 9.13% to the figure of $1,829,543 at which we have arrived, and adopting the percentage allocations through the fifth year of disposition as estimated by Murphy in Appendix 10 of his testimony, table 10-8, we reach a figure of $1,683,592.

VII.

LEHIGH & NEW ENGLAND RAILWAY CO.

A. *Introduction*

The Lehigh & New England Railway Co. (L&NE) was operated for many years as part of the CNJ rail system. Jack D. Storm, in testimony submitted on behalf of L&NE, stated that his estimate of the net liquidation value of its conveyed properties was based on the same methodology employed in valuing the CNJ. Moreover, L&NE's seven-page brief "adopts those portions of the CNJ brief analyzing the Government Parties' evidence with respect to facilities and equipment", L&NE Brief at 4,

and "the analysis and conclusions reached by the CNJ" with respect to deductions from real estate base values for title defects and selling expenses. *Id.* at 6-7. Our task in resolving the difference between the GPs' valuation of L&NE's conveyed property, $927,000, and L&NE's own valuation of $3,459,000, is lightened by L&NE's nearly complete reliance on contentions of CNJ discussed in prior sections of this opinion.

B. *Real Estate*

1. *Base Value*

L&NE conveyed 433.9 acres of real estate, over 90% of which the GPs' appraisers characterized as "abutter" property marketable only to adjoining landowners. L&NE and the GPs have stipulated that the base value of this conveyed real estate is $642,198. Sp. Ct. Rptr. N-38960. The stipulation, however, expressly provides that the state of L&NE's title to the property is not considered, and that the figure represents the sum of individual parcel appraisals without discounting. The parties also agree that the stipulated base value takes no account of holding or selling expenses. L&NE adopts CNJ's position that no deduction for title defects or discounting should be made, and takes a 12.5% deduction for all costs of disposition.

2. *Adjustments to Base Value*

(a) *Title Defects.* The GPs' largest deduction from the stipulated real estate base value is 44.531% for title defects. As we held in Section III.B.1, *supra,* some deduction for lack of title or the cost of curing title is necessary. However, the magnitude of the reduction in L&NE's case requires further scrutiny. Lacouture, the GPs' expert witness on title defects, examined 72.4% of L&NE's valuation maps to arrive at the 44.531% figure, making L&NE's title problems by far the worst of the five Transferors he considered.[90] The comparable reduction for CNJ's title defects was 7.187%. Lacouture explained the wide variation in title

defect reductions as the result of two factors. First, L&NE's conveyed property included only rights of way assembled in the nineteenth century with whatever limited interests the railroad could then acquire, and no "major properties" such as CNJ's Elizabethport Yard, which was constructed later with more attention to the need for obtaining good title. Second, Lacouture found a correlation between lower per-acre value of properties and greater numbers of title defects. L&NE's conveyed real estate was substantially lower in value, at somewhat under $1500 per acre, than CNJ's, which came to more than $8300 per acre even by the GPs' appraisal. Additionally, L&NE's conveyed real estate consisted of rights of way along two branch lines likely to have been assembled around the same time with consistent inattention to the quality of title obtained, while CNJ's much larger conveyed property would be expected to show greater variation in quality of title. L&NE made no specific answer to these arguments. We conclude that Lacouture has satisfactorily explained L&NE's substantially larger reduction for title defects, and accordingly deduct 44.531% from the stipulated base value, leaving $356,221.[91]

(b) *Selling Costs.* We concluded in Section III.B.2, that the total deduction for CNJ's selling costs should be 11% of real estate base value. Storm testified on behalf of L&NE that 12.5% was deducted for the costs of disposition. L&NE's slightly higher figure is warranted because the per-acre value that could be realized from L&NE's conveyed property is lower. We noted in connection with CNJ's selling costs that higher sales commissions are incurred with respect to less expensive properties. Accordingly, 12.5% is deducted from the remaining base value of L&NE's real estate, leaving a net figure of $311,693.

(c) *Discount to Present Value.* As our discussion in Section III.B.3 indicates, discounting is appropriate where the taking is of many parcels requiring several years to sell. We recognize, however, that sale of L&NE's 433.9 conveyed acres along two branch lines would be a much less complicated task than sale of CNJ's

more than 3000 conveyed acres. We conclude that L&NE's real estate could all have been sold in a sufficiently short period to make unnecessary discounting of the proceeds or deduction for holding costs less appreciation.

C. *Facilities and Other Assets*

Amounts of ties, rail, turnouts, other track material, and ballast along L&NE's 62.8 miles of track were stipulated by the parties. Sp. Ct. Rptr. N-37177 to N-37186. In acordance with the principles adduced in Part IV of this opinion, we assign value to these assets as follows:

1. *Ballast*

On behalf of L&NE, Storm calculated that the stipulated 140,510 cubic yards of ballast on L&NE's tracks could be sold at $1 per cubic yard, with costs of removal and sale totalling more than 50%, for an effective recovery of $70,000. The GPs ascribed no value to the ballast on conveyed property of CNJ and L&NE. For the reasons stated in Section IV.A, we conclude that the ballast had no value.

2. *Ties in Track*

Storm valued the stipulated 188,400 ties in L&NE's track at $496,000. The GPs contended that L&NE's ties were worthless. Although Storm's estimate of the number of ties reusable for rail purposes and for landscape purposes was more conservative than that employed in his valuation of CNJ's ties, we find it necessary to apply our conclusions in Section IV.B, *supra*. Adopting the estimate of 406 reusable ties per mile derived from the testimony of Mewhinney, we arrive at 16,768 ties along L&NE's 41.3 miles of main and branch track suitable for rail reuse. Applying Rodola's conclusions from his 1978 valuation, we value these ties at $2.50 each for a total of $41,920. We also take Rodola's estimate of 10% of the remaining ties, or 17,163, as a reasonable

number for landscape use. At $2 each, the landscape ties could have been sold for a total of $34,326. The combined value of L&NE's ties is therefore $76,246.

3. *Rail and OTM*

The amounts of L&NE's rail and OTM of varying weights have been stipulated, and the valuations range from L&NE's $2,070,000 to the GPs' $871,000. We reiterate our conclusion in Section IV.C, *supra,* that rail weighing 130 lbs. or more could be sold for reuse, and adopt Storm's categorization of the proportions of 130-lbs. and 140-lbs. rail suitable for reuse and for scrap. As we noted in Section IV.C, *supra,* testimony established a limited reuse demand for rail weighing 110 to 115 lbs. Although CNJ conveyed no rail in that category, L&NE conveyed some 3,130 tons of 112-lbs. and 115-lbs. rail. Of the L&NE rail of this intermediate weight categorized by Storm as suitable for reuse, we determine that half could have been marketed for reuse and the rest would have been sold for scrap. Of L&NE's rail lighter than 110 lbs., all should be valued at scrap prices. We further apply the price of $207.50 per ton for reusable rail and the prices determined by CNJ for scrap. There is little difference between L&NE's estimate of $531,000 in track dismantlement costs and the GPs' estimate of $528,000. We adopt L&NE's figure. As we found in Section IV.C, *supra,* turnouts and OTM should be valued along with the rail they accompany.

4. *Other Materials and Supplies*

Storm's $21,000 valuation of L&NE's inventory of replacement parts, rail, OTM and ties is not supported by evidence in the record and cannot be adopted. It was based on a letter received by Storm from L&NE's Trustee stating that a computer listing showed L&NE's physical inventory of materials and supplies as of March 31, 1976 at $34,893.39. Storm never received the computerized inventory from L&NE, but instead merely rounded

this figure to $35,000 and applied a 40% across-the-board reduction to reach his $21,000 estimate. This showing fails to meet the requirement of "particularity" in the Sixth Pretrial Order. The GPs are correct, therefore, in assigning no value to L&NE's other material and supplies.

5. *Miscellaneous Assets*

L&NE's Trustee communicated to Storm an estimate of $2,000 for office equipment, furniture, and appurtenances, again with no effort at particularity. We adopt the GPs' contention that these assets should be given no value. Storm ascribed a "nominal value" of $1,000 to L&NE's communications facilities, while the GPs offered a more careful calculation of reuse, scrap, and dismantlement estimates to arrive at $660. We adopt the latter figure.

D. *Equipment*

1. *Locomotives*

L&NE conveyed two locomotives, both GP-7 road switchers built in 1952 and rebuilt in 1959 after they fell into New York Harbor. These locomotives are identified in a stipulation between the parties, Sp. Ct. Rptr. N-18110 to N-18113. L&NE values the locomotives together at $200,000 for reuse, while the GPs assign a scrap value of $17,000 for the pair. We determined in Section V.A, *supra,* that of the eleven CNJ switchers of the same vintage and model, six would have been sold for scrap and five would have been sold for reuse at $30,000 each. We conclude that L&NE's two locomotives, because of their refitting in 1959, could also have been sold for reuse, thus making their total value $60,000.

2. *Cabooses*

L&NE conveyed four cabooses, all built in 1937, and no other rolling stock. Sp. Ct. Rptr. N-37165 to N-37168. Storm valued

the cabooses at $4,000 each, a price at which he thought hobbyists, hunters, and fishermen might purchase them. We conclude that the GPs are correct in assigning L&NE's cabooses a scrap value of $1,000 each, for a total of $4,000.

3. *Roadway Small Tools, etc.*

L&NE valued its Roadway Machines inventory, consisting of a tamper and a welder, Sp. Ct. Rptr. N-37169 to N-37172, at $7,000; its Roadway Small Tools inventory at $2,000; its Work Equipment at $7,000; and its Miscellaneous Equipment, consisting of two 1974 trucks, Sp. Ct. Rptr. N-37173 to N-37176, at $10,000. The GPs determined that no value should be given to Roadway Small Tools or Work Equipment, but that a combined $600 would compensate L&NE for its Roadway Machines and Miscellaneous Equipment. We find it implausible that L&NE's items of roadway machinery and trucks would be worth a mere $150 each and its other equipment categories not worth the effort of collection, sorting, and sale. We therefore accept L&NE's values for these asset categories.

E. *Winddown and Liquidation Organization and Disposition Costs*

Murphy, testifying for the GPs, estimated that the costs of winding down operations and liquidating the conveyed portions of L&NE along with CNJ would have amounted to an incremental deduction of $85,000 over and above the costs of liquidating CNJ alone. He testified that liquidation of L&NE as an independent entity would have been much more expensive. Murphy stated in deposition that $15,000 of the $85,000 total would have been attributable to L&NE's winddown. In the light of our conclusion in Section VI.A, *supra,* that no deduction for winddown is warranted, this amount is subtracted from Murphy's estimate, leaving $70,000 as our estimate of the costs of liquidating and disposing of L&NE's conveyed facilities and equipment.

VIII.

CONCLUSION

Petitions for reconsideration may be served and filed on or before 21 days from the filing of this opinion. Such petitions shall be limited to instances where the court is thought to have misapprehended evidence or to have erred in computations and shall not repeat arguments that have been made at length in the opening briefs and reply briefs and in oral argument and have been fully considered, *see* 531 F. Supp. at 1383. Such petitions shall be based solely on the record and shall not contain proffers of new evidence. Answers to such petitions shall be filed within 14 days.

We direct the parties, within 21 days from the filing of our ruling on any petitions for reconsideration (or, in the event that no such petitions are filed, within 35 days from the filing of this opinion), to submit an agreed judgment fixing the net liquidation value of the properties conveyed by CNJ in accordance with this opinion (and any opinion on the petitions for reconsideration) or if the parties are unable to agree, separate proposed judgments together with memoranda explaining the points of difference. The court considers the rulings in this opinion to be sufficiently definite and the amounts open to argument to be sufficiently small that the parties should be able to submit a single agreed judgment. Submission of the proposed judgment or judgments here directed will, of course, be without prejudice to the rights of the parties to review of our rulings by the Supreme Court of the United States. At the time when such judgment or judgments are submitted, the parties shall also indicate whether they agree that the court may take the net liquidation value as the base value of each certificate of value under § 306(a)(4) of the Act or whether either side desires to litigate the issues of the value of

other benefits and compensable unconstitutional erosion as provided in §§ 306(a)(4)(B) and (C). This opinion shall not constitute a "finding or determination" within § 303(d) of the Rail Act until final judgment is entered.

HENRY J. FRIENDLY

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

John Minor Wisdom
Judge

ROSZEL O. THOMSEN

Roszel O. Thomsen
Judge

Appendix J

FOOTNOTES

1. CNJ owns 49.9% of the preferred stock and 100% of the common stock of the Raritan River R.R. Under the Amended Certificate of Incorporation, CNJ is entitled to 49.9% of the first $1,981,600 of the value of the Raritan River, and any amounts in excess of that figure.

2. L&NE was operated for a number of years as part of the CNJ system. It has relied virtually exclusively on CNJ's arguments in the instant litigation.

3. The location of these lines is described at 531 F. Supp. at 1209 and 1373-74.

4. According to CNJ, the tentative offer was for all of CNJ's properties except three parcels of off-line realty and certain court-controlled accounts. Under the terms of the offer, the State was allegedly to assume $94 million in obligations and pay $25 million in cash. 531 F. Supp. at 1376. CNJ translated this into a promise to pay about $100 million for the conveyed properties.

5. *Sharp* v. *United States,* 191 U.S. 341, 348-49 (1903); *United States* v. *Smith,* 355 F.2d 807, 811 (5th Cir. 1966); *Liflans Corp.* v. *United States,* 390 F.2d 965, 969-70 (Ct. Cl. 1968); *Missouri Baptist Hosp.* v. *United States,* 555 F.2d 290, 302-03 (Ct. Cl. 1977); *United States ex. rel. TVA* v. *72.0 Acres of Land,* 425 F. Supp. 929, 938 n.3 (E.D. Tenn. 1976); *but see Wolff* v. *Commonwealth of Puerto Rico,* 341 F.2d 945, 947 (1st Cir. 1965).

6. The Peabody study assessed CNJ's book value at $109,439,000, CNJ's reproduction value (reproduction cost less depreciation) at $676,359,000 and CNJ's going concern value at $141,683,000.

7. After reaching a determination of the State's 1974 perception of the scrap value of the assets which CNJ conveyed on April 1, 1976, CNJ sought to add still other items. CNJ contends that under its perception approach, it is entitled to receive payment for the additional costs incurred and for the value of lost benefits foregone between late 1974 and April 1, 1976. CNJ puts these costs and lost benefits at $22,500,000—$14 million for the removal of the Newark Bay Bridge; $7.5 million in interest accruals; and $1 million for loss of investment income. CNJ also argues that it is reasonable to expect that the 1974 agreement between the State and CNJ would have provided for a 6% annual escalation in the purchase price of $72,886,000 reached in the hypothetical 1974 agreement. Such an escalation would add $6,560,000, and raise CNJ's conclusion as to the total value of its alternative scenario rights foreclosed by the Act to $101,946,000. Insofar as these items do not fall with the collapse of CNJ's perception case, they lie beyond the scope of this proceeding—determination of the value of the conveyed assets as of April 1, 1976. *See* CMV Opinion, 445 F. Supp. at 1041; Sixth Pretrial Order ¶1.

8. Whitehurst testified that at the meeting of July 26, 1974, when Sagner requested the Peabody study he stated that:

> Mr. Timpany is going to come in with the highest number he can think of and the basis that gives him the highest number. And there is going to be a variety of bases, and we want to know what the possibilities might be as to different bases as part of the overall context of what are we going to do? You know, do we want to get into it or don't we want to get into it?

9. The Peabody Study treated CNJ's real estate as having a December 31, 1973, net value of $62,687,000. The Hyde Study estimated the net value of CNJ's property to be $96,449,000 as of October 1974.

10. By the term "base value" we mean the market value of the conveyed parcels as of the valuation date, April 1, 1976, before adjustment for title defects, discounting to present value, holding costs, and selling expenses.

11. Although CNJ developed typical property values for most of the conveyed property, it employed an income based valuation in its appraisal of a few of the parcels. In particular, the CNJ appraisers used an income based valuation method to value a tract on the Liberty Harbor waterfront that had been zoned for high density residential use. A few parcels that CNJ appraised for use as parking lots were valued on an income producing basis if no comparable sales could be found.

12. L.E. Peabody & Associates, Inc. conducted an appraisal of CNJ's assets for the New Jersey Department of Transportation between July and September of 1974. As part of its study, Peabody analysed CNJ freight traffic by line segment to determine the minimum trackage required to provide freight service to customers serviced by CNJ. The study examined 23 segments of CNJ track totaling 366.4 route miles. In its report, Peabody discussed the ability of other rail lines to service the areas then serviced by CNJ.

13. CNJ's appraisers assumed that depressions would not be filled prior to sale.

14. In fact, CNJ argued that the sale of the ballast and fill would produce $2.3 million in net proceeds. *See* Section IV.A., *infra*.

15. As the GPs point out, and we discuss in Section IV.A., *infra*, CNJ has not presented evidence on the expected demand for fill in the markets that CNJ could have supplied. As evidence that a market existed, CNJ relied on its discovery that Conrail has removed fill from conveyed property. CNJ did not present evidence regarding the use to which Conrail has put the removed fill nor any prices at which Conrail has sold fill. In the absence of more detailed evidence, we must assume that the market would have been slow to absorb 6.4 million cubic yards of fill.

16. Our conclusion that the presence of embankments may have had a negative effect on the value of the underlying real estate is consistent with our finding in Section IV.A., *infra*, that CNJ has failed to produce sufficient evidence to establish a positive NLV for its fill and ballast.

17. CNJ argues that its "original contours" assumption was an inconsequential factor in its appraisals because most of the land in question was level. As support for its argument, CNJ cites evidence that 92% of its right-of-way acreage in Essex County is level with adjacent property. *See* Simon Testimony, October 26, 1981, Exhibit 2, at 15-16. Using the same sources, however, we find that only 60% of the conveyed right-of-way acreage in Hudson and Union Counties is level with surrounding terrain. *See* Simon Testimony, *supra*, Exhibit 2, at 20-21; Barkan Testimony, October 26, 1981, Exhibit 3, at 15-16. CNJ does not indicate how much of the total appraised value of real estate is applicable to elevated property. It is entirely possible that the rights of way that have the most topographical variances are located in the most expensive areas. In the absence of additional information, we must assume that the use of the "original contours" assumption had a significant effect on CNJ's real estate estimates.

18. *See* note 12.

19. It is difficult to determine what sales the GPs actually relied on, except in individual instances covered in deposition testimony, because they did not file a list of the comparable sales used in their valuations.

20. Another widely recognized objection to the admission of subsequent sales data is that the price paid in any purchase of nearby property after the date of condemnation will have been artificially inflated by the enhancement of land values often brought about by the condemnation. *See United States* v. *320.0 Acres of Land*, 605 F.2d 762, 800 (5th Cir. 1979). Decisions can be found authorizing exclusion of evidence of such sales. *See United States* v. *Meadow Brook Club*, 259 F.2d 41, 46 (2d Cir.), *cert. denied*, 358 U.S. 921 (1958); *International Paper Co.* v. *United States*, 227 F.2d 201, 209 (5th Cir. 1955); *District of Columbia* v. *Lot 813 in Square 568*, 232 F. Supp. 714, 719 (D.D.C. 1964), *aff'd sub nom. Rubinstein* v. *District of Columbia*, 346 F.2d 833 (D.C. Cir. 1965). The weight of authority, however, has been to the contrary. The possibility that the prices obtained in comparable sales subsequent to the date of the taking have been influenced by the fact of the taking has been held to go to the weight, not the admissibility, of evidence of such sales. *See United States* v. *320.0 Acres of Land*, *supra*, 605 F.2d at 802-03; *United States* v. *1,129.75 Acres of Land*, 473 F.2d 996, 998-99 (8th Cir. 1973); *United States* v. *691.81 Acres of Land*, 443 F.2d 461, 462-63 (6th Cir. 1971); *United States* v. *79.39 Acres of Land*, 440 F.2d 1190, 1191 (6th Cir. 1971); *United States* v. *An Easement and Right of Way*, 405 F.2d 305, 308 (6th Cir. 1969); *United States* v. *63.04 Acres of Land*, 245 F.2d 140, 144 (2d Cir. 1957); *see also United States* v. *Meadow Brook Club*, *supra*, 259 F.2d at 49 (Lumbard J., dissenting). The condemnation here was unlike those in which property has

been taken for a new value enhancing use, e.g., farmland taken for conversion into a highway. The use remained the same; the only value enhancing factor would have been the removal of doubt with respect to continuation of rail services. Of course, sales taking place many years after the date of the taking would be far less relevant to the determination of a market price on that date than would sales immediately before or afterward.

21. Heaney testified that he and Hannoch relied on 34 sales before April 1, 1976 and 27 sales after that date in appraising the real estate in Essex, Hudson, and Union Counties. Hannoch/Heaney Deposition, December 10, 1981, at 115, 33 CNJ App. at 44A. The GPs maintain that more than half of the sales that Hannoch and Heaney used to value Elizabethport Yard and Brills Yard were post-April 1, 1976 sales.

22. The GPs contend that Van Horn furnished Hannoch and Heaney with:

> (A) the work papers from his 1978 appraisal, which included, as a step in Mr. Van Horn's calculation of liquidation values, the cost to remove abutments and retaining walls; (B) "control sheets" containing valuation section, map and parcel number, municipality, county and street location, acreage and zoning; (C) maps; and (D) comparable sales information.

GPs Opening Brief at D-43; *see* Motion, and Supporting Memorandum, of the Government Parties for an Order to Show Cause Why Central Jersey Industries, Inc. Should Not Be Compelled to Produce Certain Work Papers Relating to Their Real Estate Base Values, January 19, 1982, at 3-7. While not denying that the materials Van Horn furnished to Hannoch and Heaney contained all of this information, CNJ has argued that the GPs should not be granted access to these materials because Hannoch and Heaney only relied on them to determine the cost to remove abutments and retaining walls. *See* Objections of Central Jersey Industries, Inc., and Brief in Support Thereof, to Government Parties [sic] Motion of January 19, 1982, to Compel Production of Certain Documents, January 25, 1982, at 6. In an order giving the GPs access to these materials, Judge Thomsen reserved any ruling on the admissibility of the contents. *See* Order on Motion of the Government Parties for an Order to Show Cause Why Central Jersey Industries, Inc., Should Not Be Compelled to Produce Certain Work Papers Relating to Their Real Estate Base Values and Objections of Central Jersey Industries Thereto, January 27, 1982, Paragraph 2. CNJ has not objected to the admission of these materials. *See* Third Order Governing Receipt of Written Testimony, Deposition Transcripts and Other Materials in Evidence, November 19, 1982, Paragraph 2.

23. *See* Van Horn Deposition, February 16, 1982, at 45.

24. *Id.* at 119-20.

25. In their brief, the GPs contend that Van Horn relied solely upon data from sales prior to the valuation date in making his appraisals. GPs Opening Brief at D-70. The evidence indicates, however, that Van Horn did consider some sales after April 1, 1976. *See* CNJ Reply Brief at 83 n.*; Van Horn Appraisal (GPs), June 2, 1982, at 5.

26. *See* note 22.

27. In arriving at base values, CNJ and the GPs instructed their appraisers to assume that CNJ had fee simple title to all conveyed parcels.

28. Lacouture made no further deduction for the decrease in value of the remainder of a larger, otherwise marketable parcel when a small portion of it was found to have a title defect, even if the unmarketable portion provided frontage or access to the rest.

29. Our decision is in accord with the reasoning of Judge Posner writing for the Seventh Circuit in *Chicago & North Western Transp. Co.* v. *United States*, 678 F.2d 665, 670-71 (1982), which denied compensation for C&NW real estate held by adverse possession when state law provided reversion to previous owners if such land should cease to be used as railroad right of way.

30. The title insurer would inquire first into the disposition of the grantor's adjoining property and would, in any case, require indemnification by the seller.

31. CNJ adds a contention that owners of adjoining land who hold automatic reversionary rights would pay some price to remove clouds on their title created by CNJ's former interests. We concur in the GPs' response that no compensation is warranted for any "hold up" price CNJ may have hoped to receive on this account.

32. The DeLeuw Cather report called Wyer Dick's total real estate liquidation expenses "much too low," but did so on the basis that salaries of in-house personnel were computed only for a five year period. DeLeuw Cather did not find fault with the 10% figure for brokerage fees and related expenses.

33. The State of New Jersey has paid into court over $7 million for property taken in 1976 from CNJ in the Liberty Park area of Jersey City. CNJ has litigated this condemnation award, thus far with success, and has not included its considerable litigation expense in the computation of selling expenses as a percentage of gross proceeds.

34. The parties have stipulated that whenever a party seeks to apply a risk inclusive discount rate to proceeds figured in real dollars, that rate shall be 9.13% per 12-month period, and that whenever a party seeks to apply a risk inclusive discount rate to proceeds figured in nominal dollars, that rate shall be 15.22% per 12-month period.

35. We need not consider this possibility since such a buyer would have demanded a discount to compensate for the time he would have needed to resell the parcels and for other purposes considerably as great or greater than the discount considered here.

36. One example is the most valuable single piece of property—CNJ's Elizabethport Yard. This property, a freight and passenger car repair facility, contained 232 acres of conveyed property. In order to prepare the Elizabethport Yard for the industrial use which was agreed to be the highest and best, four abandoned and uninhabitable buildings would have to be demolished and several obstacles and abutments would have to be removed in order to create adequate access. Similarly, according to Hannoch and Heaney, the highest and best use for several of CNJ's other parcels (such as Ib/26/4 and Ib/26/2) was as parking lots. In order to make even this modest conversion, the properties would have to be cleared, levelled, and given adequate drainage.

37. Developable properties are properties that are marketable generally. Abutter properties are marketable, if at all, only to adjacent landowners.

38. Wiedeman and Moody who testified on behalf of the GPs concerning the pace of disposition of abutter right of way, assumed that a fixed percentage of abutter property would be sold each year. For CNJ properties located in Somerset, Middlesex, Camden, Burlington and Atlantic Counties, it was assumed that 20% of remaining abutter property would be sold each year. For the CNJ properties located in all other counties, it was estimated that only 15% of inventory would be sold each year.

39. These percentages relate only to those CNJ properties that the GPs concluded had positive economic value. The GPs divided CNJ's property into smaller parcels it called valuation units. These valuation units were then categorized as either "major properties," "abutter properties," "developable properties," or "other properties." No value was assigned to valuation units labelled as "other properties" as they were considered unsaleable. Seven percent of CNJ's land in the disputed counties was categorized as "other property."

40. The ICC also applied a "discount" to the market value of the New Haven's land "on the assumption that a certain portion of the land would remain unsold at the commencement of the final year of liquidation and full market value would not be realized." 331 I.C.C. at 662. Apparently the word "discount" was there used in the sense of a markdown to move the properties rather than a discount to reflect the lesser worth of future as against present payments.

41. Indeed, CNJ might have filed for abandonment even while negotiating, if only as a bargaining chip.

42. In fact, negotiation with the State of New Jersey would doubtless have continued, and might have lessened both the zeal of the Trustee in pursuing other sales and the likelihood of interesting prospective buyers. But the GPs cannot have it both ways. If, as they argue, the price New Jersey would have paid is to be determined by what CNJ could have obtained from others, the continued presence of New Jersey as a potential purchaser cannot fairly be taken into account as a price depressant.

43. This seemingly high figure reflects the large amount of preparatory work that would have been done in the 15 months preceding April 1, 1976.

44. CNJ would have us disregard property taxes entirely on several grounds. First, CNJ argues, local property taxes are already taken into account in arriving at the appraised base value of the real estate. Be that as it may, the taxes still must be paid until the property is sold, and we have determined that the conveyed real estate could not all have been sold on April 1, 1976. Second, CNJ contends that property taxes are completely offset by interim income from leases running on the conveyed real estate, the last of the topics to be considered in this section. With the parties' estimates for both items before us, we can make that determination for ourselves. Finally, CNJ argues that difficulties of proof make both property taxes and interim income impossible to quantify. Again the parties' estimates, quite close in result, belie the claim.

45. In taking appreciation of real estate into account in estimating local property taxes, Tesh adopted the appreciation forecasts of Eastdil for developable properties and Wiedeman and Moody for abutter properties. Because we have decided that these appreciation forecasts were too low, the real estate tax estimates should be adjusted to reflect the additional 3% annual appreciation mandated by this opinion.

46. Wyer Dick valued the ballast of CNJ at $208,000 in its study completed in 1970. In 1974, the Peabody Study adopted the Wyer Dick value for ballast as appropriate.

47. Storm's testimony with respect to the five removal sites that he or his associates observed is inconclusive. At the Newark Bay Bridge site and at the parcel near Doremus Ave. and the Passaic River, the only two sites where Storm actually saw removal operations, Storm did not know who removed the fill, what happened to it, or how much Conrail received for it. Storm Deposition, March 21, 1982, at 1249-51, 35 GPs Supp. App. at 314-16. With respect to the Newark/New York line removal site, Storm relied on the testimony of his associate Plum, who did not know who removed the material, when removal occurred, or how much was paid. Plum also did not know who removed ballast and fill from the EL's conveyed track or how much was paid for it. On a former LV line, Storm testified that he saw the results of fill removal but he did not know what happened to it, or whether it was paid for.

48. Cascading is the process of reusing rail, other track material, and ties that are replaced when lines are renovated with new or better quality materials. The replaced material is reused, or cascaded, in tracks having lighter duty requirements.

49. The GPs also point out that Storm did not assign any value to the EL's ties for landscape use when he served as overall project director of the Wyer Dick study to determine the EL's liquidation value as of 1976.

50. Rodola determined that the CNJ would have sold 174,430 ties for rail reuse and then subtracted from this amount 12,095 ties that had been installed with funds received under Section 215 of the Rail Act.

51. Mewhinney testified that he sold good quality reusable ties at prices in the $5.00-$5.50 range to railroads during 1973 and 1974. DeLeuw Cather, anticipating that there would be a severe shortage of used ties, estimated the market prices at $6.60 per tie for reusable rail ties and $5.50 per tie for other uses. DeLeuw Cather, Development of Standard Unit Salvage Values, 23-24, 3 CNJ App. at 418-19.

52. The track of a railroad consists of the ballast, ties, rail, and other track material (OTM) formed into a structure on which trains operate. OTM is the material which holds the track together, and it comprises spikes, tie plates, joint bars, bolts, and anchors. Turnouts are switches that divert trains from one track to an adjoining line.

53. Headwear is the wear to the surface of the rail that comes into contact with a train's wheels. The AREA table sets out four classes for use of rail: main line (Class I), branch line (Class II), light branch line (Class III), and yards (Class IV). For each class, the table assigns figures for maximum allowable headwear, both vertically and horizontally, for various weights of rail. The AREA table is a guide for determining the class of track in which a given rail can be relaid. *See* Rail Use Opinion, 531 F. Supp. at 1239 & n.95.

54. Storm's classifications were modifications of the AREA standard. Storm retained the four classes of rail but modified this classification system to eliminate the distinction between heavy and light branch line use. The stipulation of a single price for relay rail eliminated the need to distinguish between the various kinds of relay use. Storm's system also classified track by mile rather than by a specific piece of rail. *See* Storm Deposition, March 21, 1982, at 1363, 38 GPs Supp. App. at 575.

55. The Bechtel Study was conducted in 1974 by six independent engineering firms for the USRA. The purpose of the Bechtel Study was to provide the USRA with an objective assessment of the condition of the Transferors' properties. During the Bechtel Study, qualified railroad maintenance engineers sampled a seven-rail section (273-feet) of the track structure and right of way every two miles on each main and running track on the Transferors' lines. These engineers recorded the

condition of the rails, ties, ballast, surface, alignment, drainage, and vegetation for each sampled section.

56. The GPs, like the CNJ, relied on the Bechtel Study as their source of information on the condition of the CNJ's rail.

57. The GPs used the ¼ inch measurement because it is the maximum end batter that the Federal Railroad Administration allows for Class IV track. Class IV track is capable of carrying trains at speeds of 40-60 miles per hour, which is the appropriate speed for main lines and high density branch lines.

58. The GPs' expert, Morgan argued that the end batter criterion is appropriate because end batter could indicate other defects in the rail. We are more convinced by the testimony of Storm, who stated that end batter results from poor joint maintenance rather than poor rail maintenance and can be eliminated by cropping.

59. The GPs' data did not show the placement of the defects used to disqualify rail for reuse. Many such defects undoubtedly were located in the end of the rail because the rail joint is the most difficult area of the rail to maintain and contains defects not found in other parts of the rail, such as bulk hole cracks.

60. The value of controlled-cooled rail is largely in the elimination of transverse defects. Such defects are more likely to show up early in the life of the rail. Morgan/Gabriel Deposition, March 29, 1982, at 91-92, 3 CNJ App. at 157-58.

61. DeLeuw Cather reached this conclusion in a report to determine the net liquidation value of a portion of the Rock Island. The Rock Island's relay rail being considered for reuse weighed between 110 and 119 lbs. Report to the Southern Pacific Transportation Company on the Net Liquidation Salvage Value of the Missouri-Kansas Division—Chicago, Rock Island and Pacific Railroad Company, Volume 1-Facilities, November 25, 1977, at 29.

62. Of the rail 131 lbs. and over, Morgan and Gabriel classified 23,231.2 net tons out of a total 26,526.2 net tons as suitable and marketable for reuse. Storm classfied 22,939.38 net tons out of a total of 25,558.67 net tons as suitable and marketable for reuse. The difference results from Storm's decision to abandon in place all rail in grade crossings whereas Morgan and Gabriel assumed it would be recovered. Because we find the CNJ's methodology on suitability to be superior to that of the GPs, we conclude that Storm's figure is the appropriate one to use on rail weighing over 130 lbs.

63. The CNJ contends, based on its analysis of rail replacement rates, that as much as 75% of all track is non-controlled-cooled. *See* CNJ reply Brief at 164. Because engineering standards discourage the use of controlled and non-controlled-cooled rail together, the availability of non-controlled-cooled rail would have presented railroads a unique

opportunity to upgrade this kind of rail in their tracks. CNJ also presented substantial evidence showing that there would be a substantial demand for high quality relay rail to replace worn-out rail due to the general deterioration of the American railroad system in recent years. *See* Storm Rebuttal Testimony, June 2, 1982, at 8-9, 3 CNJ App. at 466-67.

64. It is difficult to determine from the record the exact amount of 130-lb. rail that the CNJ would have sold. We have calculated that Storm considered 16,930.178 tons of 130-lb. rail to be suitable and marketable for relay.

65. Both sides agreed that bolts, spikes, and anchors should be valued at scrap because this OTM would have deteriorated from wear or have been damaged during dismantlement.

66. Morgan and Gabriel for the GPs and Storm for the CNJ all agreed that the purchasers of CNJ's rail would have relaid this rail as continuously welded rail. Because the rail is welded, there is no need for angle bars or joint bars to hold the rail together. The CNJ failed to produce any convincing evidence that angle bars and joint bars would have been marketable separate from the rail with which they were associated.

67. The Rail Stipulation did not preclude the GPs from "introducing evidence that in transactions where other track material is sold together with relay rail, the price of the OTM per net ton would be the same as the price of the relay rail."

68. The valuation of turnouts is more complicated than the valuation of rail use and OTM. First, the rail and OTM in turnouts was classified for reuse or scrap in accordance with the classification of the rail they were associated with. Then, an excess (or incremental) value for the additional material in the turnout was calculated because the unique items in turnouts exceed in weight and cost the equivalent length of track material which they replace. The amount of excess weight and cost varies according to the weight of the rail and the size of the turnout. These incremental materials (the excess of materials in turnouts over materials in equivalent length of track) are valued at 75% of cost. These values are found in Appendix B of Storm's Testimony Concerning the NLV of the LNE, October 26, 1981, 3 CNJ App. at 453.

69. All of the GP's witnesses relied on the *American Metal Market* to find prices for scrap. Michaels testified that this publication is the most authoritative source of scrap steel prices and that the vast majority of scrap merchants rely on it. Michaels Testimony, October 26, 1981, at 5.

70. The GPs make other criticisms of the CNJ's methodology. The GPs contend that the use of *Iron Age* instead of the *American Metal Market* caused the CNJ to set their unit prices $4 higher than the GPs. Neither side, however, really explains the difference in prices or

attempts to prove which one is correct. The GPs also contend that the CNJ's use of scrap prices for the three months after April 1, 1976 inflated the price for scrap.

71. The CNJ makes other criticisms of the GPs' approach to determining the scrap price. CNJ argues that Kneafsey's model ignored that the Transferors may have enjoyed a distinct advantage over other scrap sources because of the large quantity of uniform grade scrap that the dismantlement process would generate. Kneafsey gave no consideration to the fact that the Transferors' scrap may be easier to gather than other kinds of scrap. Kneafsey Deposition, April 15, 1982, at 53, 3 CNJ App. at 28. The CNJ also points out that there were scrap shortages in 1972 and 1973 and that some sources anticipated that these shortages would recur later in the 1970's. *See* Hearings: Ferrous Scrap Export Controls Before the United States Senate Committee on Banking, Housing, and Urban Affairs, 93 Cong., 1st Sess. 273 (1973) (statement of Paul B. Akin, President of Laclede Steel Company, on behalf of members of the American Iron and Steel Association).

72. The CNJ had 173,390 untreated cross ties and 1,559 untreated switch ties in its inventory. Approximately two-thirds of these were located at the Kerr-McGee treatment plant in Avoca, Pennsylvania, with the remainder at a yard in McAllisterville, Pennsylvania. The inventory also contained 12,265 treated, unused cross and switch ties stored in CNJ's warehouses. *See* Morgan/Gabriel Testimony, February 16, 1982, Exhibit 4, at 7-8. (Report by Mewhinney Concerning Marketability of Reuse Ties).

73. The GPs reduced the base price of the CNJ's ties by 25% to account for all costs associated with disposition. As stated, we found this deduction to be too high. Our 15% figure reflects our approximation of a more realistic figure for the disposition costs of these assets.

74. It was unclear from the record how much rail was in the CNJ's rail inventory. We concluded this amount was 3276.76 net tons, and we valued this material at $84 per net ton. If this amount is incorrect, we are certain that the parties will make an adjustment for our error.

75. In their efforts to value the other materials and supplies accounts, both the GPs and CNJ relied on an inventory listing provided by CNJ with the help of its auditors, Haskins & Sells. The GPs discovered several inaccuracies in the inventory listing and would have us infer from those mistakes that the entire listing is tainted and the result of creative accounting. Because of the insignificant dollar amount of the errors the GPs discovered, the absence of an alternative inventory listing, and our general agreement with the values the GPs propound, we need not consider the GPs' challenge of the inventory.

76. Because the stipulated value of the OTM in inventory exceeds the book value of that asset, CNJ adopts the book value as its base value.

APPENDIX K

Appendix K

IN THE SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed Sep 20, 1983, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

Opinion on Petitions for Reconsideration on Valuation of the Central Railroad of New Jersey and the Lehigh & New England Railway for Nonrail Use

Before FRIENDLY, Presiding Judge, and WISDOM and THOMSEN, Judges.

PER CURIAM:

In accordance with the first paragraph of Part VII of our opinion filed July 12, 1983, CNJ, the L&NE and the GPs have filed petitions for reconsideration and the adverse parties have responded. We rule as follows:

I. LOCOMOTIVES AND FREIGHT CARS

A. *Scrap Steel Prices*

CNJ objects to our pricing the steel in locomotives and freight cars that would be scrapped at $76 per ton, the figure that the GPs had proposed for all steel scrap, rather than at the CNJ's figure of $84 per ton, which we adopted for rail (pp. 55-58). The GPs concede the point and we accept the concession. However, we agree with the GPs that the $84 price should be applied to the tonnages calculated by the GPs' experts Mauro and Michaels rather than to the somewhat higher tonnages estimated by CNJ.

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The GPs object to our valuation of eight MD SD40 road freight locomotives which admittedly were marketable for reuse (p. 68). We adopted the Wyer Dick valuation of $1,971,000 which had been calculated on the basis of $219,000 for each of 9 locomotives. In fact one had been disposed of before the Wyer Dick study. The $219,000 figure should thus be applied to only 8 such locomotives for a total of $1,752,000.

The CNJ objects to our use (p. 70) of a figure of $5,330 per unit for its gondola cars and says the correct figure is $6,569. It is unnecessary to state the reasons since the GPs agree.

In its answer to the GPs' petition for reconsideration CNJ urges for the first time that the GPs' expert Dunn erred in valuing at zero 112[1] of the 496 freight cars valued as scrap because their value was less than the balance owing under a Conditional Sales Agreement (CSA), a methodology which we accepted—concededly without objection from CNJ. CNJ argues that the only deduction should have been for $94,181, the amount of CSA payments accruing after April 1, 1976, rather than the full amount of the CSA payments. The basis for this is a claim that "These overdue payments were satisfied by CNJ at the time of its reorganization and only the final installment on the CSA (due 10/1/76) was to be paid by ConRail." We do not pass on the merits of the argument since it comes too late for consideration in this valuation proceeding and the factual assertion is without record support. Our ruling is without prejudice to CNJ's advancing a claim against Conrail for unjust enrichment from this transaction in any court of appropriate jurisdiction if so advised.[2]

The following tables represent our recalculation of the value of CNJ's locomotives, freight cars and cabooses and other equipment accounts:

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Locomotives

Description	*Year Built*	*No. of Units*	*Unit Value 4/1/76*	*Total*
EMD Switcher SW1	1939-42	4	9,700	38,800
EMD Switcher NW2	1942	2	9,700	19,400
EMD Switcher SW7	1950	4	9,700	38,800
EMD Switcher SW9	1951-52	11	22,000	242,000
EMD Road Switcher	1952	11	5 x 30,000	150,000
GP7, 7P			6 x 9,700	58,200
ALCO Road Switcher RS2	1950	8	9,700	77,600
ALCO Road Switcher RS3	1951-53	18	9,700	174,600
EMD Road Freight SD35	1965	12	182,000	2,184,000
EMD Road Freight SD40	1967	8	219,000	1,752,000
				4,735,400

Freight Cars and Cabooses

Description	*Year Built*	*No. of Units*	*Unit Price 4/1/76*	*Total*
Box Cars	1957	34	1,300	44,200
Equipped Box Cars	1956-57	12	1,300	15,600
Gondolas	1957-65	51	6,569	335,019
Covered Hoppers	1956-57	131	87 x 3,453	300,411
			44 x 1,500	66,000
Cabooses	1942	29	1,300	37,700
		257		798,930
Covered Hoppers		176	1,500	264,000
Covered Hoppers		105	CSA	0
Flat Cars		9	1,700	15,300
Box Cars		163	1,300	211,900
Open Hoppers		26	1,500	39,000
Cabooses		10	1,300	13,000
Gondolas		7	CSA	0
		496		543,200
TOTAL		753		1,342,130

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Other Equipment Accounts

Description	*Total*
Roadway Sm. Tools	14,000
Roadway Machinery	400,000
Shop Machinery	379,000
Power Plant Machinery	4,000
Passenger Cars	6,000
Work Equipment	290,000
Misc. Equipment	53,000
	1,146,000

Summary

Locomotives	4,735,400
Freight Cars and Cabooses	1,342,130
Other Equipment Accounts	1,146,000
	7,223,530
Equipment Obligations	−1,356,000
	5,867,530

II. Ties

CNJ and L&NE attack our reliance (pp. 44-45, and 94) on the valuation made in 1978 by Rodola, Wyer Dick's project manager for the study of the CNJ's liquidation value, as supported by the testimony of GP witness Mewhinney. As it has done throughout this proceeding, CNJ does not adequately recognize that the issue with respect to ties is not simply reusability but also marketability, and it has failed to supply any estimate that we could reasonably accept. With the CNJ's figure clearly too high and the GPs' too low, we continue to believe that the amounts fixed in our opinion represent the best solution available on the record.

Appendix K

III. Real Estate

A. *Testimony of Hannoch and Heaney*

CNJ criticizes the portion of our opinion (pp. 14-16) which concluded that its appraisers, Hannoch and Heaney, "employed two assumptions that detract significantly from the reliability of their estimates." One was "that all CNJ real estate would continue to be served by a rail line if the purchaser so desired." CNJ argues that Hannoch and Heaney assumed continued rail service only "in those areas where rail was a factor to the users of land." Hannoch/Heaney Deposition, March 24, 1982 at 750, 5 CNJ App. at 0084. Our criticism, still unanswered by CNJ, was that this assumption was unjustified and that the record supplied no way to adjust for the error. The other assumption was that, with respect to embankments, the land would be returned to its original contours prior to sale, this being based on the premise that fill materials could be sold on site for a price greater than the cost of removal. CNJ now argues that any error on this score had only minor effect and has presented tables, purportedly constructed from the record, showing that 94.2% of the values in Essex County, 95.4% of the values in Hudson County, and 79.17% of the values in Union County were in level parcels; it suggests that we adopt the Hannoch-Heaney valuations for the level parcels and the Van Horn valuations for the balance. The GPs object that the proposal comes too late since it would deny them opportunity for cross-examination and rebuttal of the classifications now made by CNJ counsel. We agree. CNJ knew all along that the topography issue was very much in the case. At this late stage it will not be allowed to reverse its tactical decision to go all-out for the Hannoch-Heaney approach to that issue.

B. *Adjustments to Van Horn valuations*

On the other hand, we agree with some but not all of CNJ's arguments that Van Horn's valuations require upward adjustment.

Appendix K

1. *Bridge dismantlement and removal costs*

The parties had entered into a stipulation on February 5, 1982, that the NLV of CNJ's bridges should be taken as zero. Sp. Ct. Rptr. NO39193. However, Van Horn had deducted $559,000 for bridge removal costs and CNJ asks that this be added. The GPs concede that an adjustment should be made. However, they disagree with the amount since they had already made a partial adjustment by valuing at zero parcels where Van Horn's appraisal showed a negative value after removal. We find that an upward adjustment of $349,800 is required.

2. *Omitted parcel*

Both sides agree that an upward adjustment of $75,000 should be made because of Van Horn's omission of a parcel in Union County designated as Ig/2/3.

3. *Title Defects*

CNJ argues that we have double-counted in making an adjusted deduction of 7.162% from base value for title defects on the basis of the testimony of Lacouture (pp. 21-23) and that Van Horn made an adequate deduction for this factor.

The workpapers supplied in the appendix to CNJ's petition for rehearing (5 CNJ App. at 0002) show that it has considerably exaggerated the impact of what Van Horn did on this score and that it is feasible to make an adequate adjustment for double counting without rejecting Lacouture's careful study. The workpapers relate to only 21 parcels with a total area of 116.3 acres. Of these Van Horn considered title to 28.9 acres to be impaired and to 87.4 to be unimpaired. However, of the 28.9 acres with impaired title he valued 20.9 at $118,500. With but one exception (parcel Ib/9/2) Van Horn valued impaired and unimpaired portions of the same parcel at the same per acre price and applied the same liquidation factor. In other words, when Van Horn did assign value to land with impaired title, he made no

deduction for the impairment. Accordingly, there is no double counting in applying Lacouture's discount to the valued acreage. This leaves only 8 acres to which Van Horn ascribed no value because of the impairment. In all but a few instances it is possible to value these impaired acres at the same price per acre as unimpaired portions of the same parcel and then apply Lacouture's discount. Where this is not possible because the entire parcel suffered an impairment, and imputed value (i.e., what the land would be worth but for the impairment) can be reached, perhaps a bit too favorably to CNJ, on the basis of the average per-acre price of all valued parcels, to wit, $12,400 per acre, or a total of $163,700. Van Horn's base value should be increased by that amount, less the generally applicable 7.162% deduction for title defects, or a net increase of $151,976.

4. *"Free standing" parcels*

CNJ objects that Van Horn appraised certain parcels without regard to the higher price they would have commanded if sold along with retained parcels. The latter method of valuation would have been permissible, see *Olsen* v. *United States*, 292 U.S. 246, 256, (1934), and apparently was adopted by the appraisers for both CNJ and the GPs. However, it is impossible to determine how much Van Horn would have increased his valuations if he had adopted the approach now urged.

5. *Appreciation from 1974 to April 1, 1976*

CNJ urges that since Vane Horn used 1974 market values, these should be adjusted upward by 8% to reflect appreciation to April 1, 1976. The issue is problematic. Van Horn used some comparable sales that were later than 1974 and some that were even later than April 1, 1976 (Opinion, p. 19), although he used earlier ones as well. Although he was of the opinion that there had been appreciation between 1974 and April 1, 1976, of "less than 10 percent", he refused to set a percentage or to say that an

adjustment was required. Wyer Dick's former president, Shannon, a witness for CNJ, testified that real estate values in Northern New Jersey had declined, as did the GPs' witness Eastdil. Although we could well stand on our opinion, we have determined that in the interest of entire fairness to CNJ, Van Horn's base value should be increased by 3% to reflect appreciation to April 1, 1976.

6. *"Rapid Sale" Valuation*

CNJ contends that we should not have discounted Van Horn's base values because Van Horn included among "liquidation factors" a component calculated to bring about "rapid sale" of the real estate. Van Horn's testimony as to what he meant by "rapid sale" is vague.[3] It is clear that his "rapid sale" assumption was not the same as a "forced sale" or "distress" price valuation, see GPs' Opening Brief at G-19 to G-23. There is nothing to indicate that he assumed a particularized pace of sale and applied discounts to reflect this. To the contrary he testified that a particularly ill-situated parcel would be disposed of under his "rapid sale" approach in "something less than eight years". We have determined that 55% of the conveyed real estate would be sold in the first two years and that only 5% would remain to be sold in the 8th year, and there is no way to tell how much more rapid pace Van Horn assumed. However, again in the interest of complete fairness to CNJ, we will increase his base values by another 3% in order to protect against possible double discounting.

IV. Liquidation Organization and Disposition Costs

The GPs contend that we erred in rearranging the order of the steps by which the GPs' witness Murphy updated Wyer Dick's 1968 study of these costs. According to the GPs, the subtraction of certain double-counted costs (Opinion, p. 88) should have preceded our adjustment for the decrease in the size of CNJ's

operations from 1968 to 1976 and the division between CNJ's conveyed and retained assets on pp. 84-87 of the opinion.

Our original reading of Murphy's testimony was that he meant the double-counted costs for trackwork and real estate disposition to reflect solely those expenses attributable to the conveyed assets, as measured by the GPs' witness Tesh and as reflected in the dismantlement stipulation. However, we conclude that the GPs are correct in stating that the numbers Murphy used are those of the 1968 Wyer Dick study updated to 1976 and reflect a larger "whole" CNJ. We therefore sustain the GPs' contention that the double-counted costs should be subtracted before applying our successive 40% and 37.6% reductions, in the general manner set forth on p. 14 of their petition for reconsideration.

V. Method of Discounting

Although neither petition for reconsideration raises a question as to the method for discounting payments to be received and made after April 1, 1976, comparison of the method of discounting used on the last page of the GPs' recalculation of liquidation organization and disposition costs (GPs' Petition, Exhibit 3) and that used by CNJ in connection with its pace of sale argument (CNJ's Petition, p. 17), makes it evident that the parties differ in their application of the stipulated 9.13% discount factor. Although we could leave this for the parties to work out in their discussions on an agreed judgment (Opinion, pp. 97-98), we think it preferable to instruct that all proceeds and expenses for a given year should be treated as being received or paid at the mid-point of the year.

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We have carefully reviewed such other points as are raised in CNJ's petition for reconsideration. Almost all of these constitute reargument for issues already considered and decided and do not merit further discussion.

The parties shall now proceed as directed by the final paragraph of our opinion filed July 12, 1983.

HENRY J. FRIENDLY

.....

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

.....

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

.....

Roszel C. Thomsen
Judge

Appendix K

FOOTNOTES

1. These were 105 covered hoppers and 7 gondolas, see Opinion pp. 70 and 77. The GPs' petition for reconsideration had not injected the issue, as CNJ's answer intimates; the GPs simply followed a methodology to which CNJ had never objected and which CNJ had used in its opening brief.

2. If the GPs should consider CNJ's claim to be meritorious, they are, of course, free to accept it in this proceeding, in whole or in part.

3. He defined the term to mean an attempt to reach a value "at which sale could be made without any undue delay and, in fact, without what might be considered a normal waiting time for the sale of property." Van Horn Deposition, June 29, 1982, at 151-52.

APPENDIX L

Appendix L

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed Dec 5, 1983, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER SECTIONS 303(c) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

ORDER MAKING CERTAIN FINDINGS AND DETERMINATIONS PURSUANT TO SECTION 306(c)(4) OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

On July 12, 1983, the Court issued its Opinion On Valuation of the Central Railroad of New Jersey and the Lehigh & New England Railway for Nonrail Use ("CNJ Opinion"), and on September 20, 1983, the Court issued its Opinion on Petitions for Reconsideration with respect to the CNJ Opinion.

On November 1, 1983, pursuant to the final paragraph of the CNJ Opinion, proposed forms of judgments together with supporting memoranda were separately submitted by the United States of America and the United States Railway Association (together "the Government Parties") and Central Jersey Industries, Inc. ("CJI"), on behalf of the Central Railroad Company of New Jersey and six affiliated transferors, Communipaw Central Land Co., Dover & Rockaway Railroad Co., Mt. Hope Mineral Railroad Co., Wharton & Northern Railroad Co., Bay Shore Connecting Railroad, and Central Railroad Co. of Pennsylvania (hereafter "CNJ and its affiliates"). As reflected in these memoranda, the parties have agreed that the value of other benefits and

compensable unconstitutional erosion, within the meaning of Sections 306(c)(4)(B) and (C) of the Regional Rail Reorganization Act of 1973, as amended (the "Rail Act"), are zero for CNJ and each of its affiliates.

The Court has considered the proposed forms of judgment and supporting memoranda submitted by the parties, has taken due note of all prior submissions and proceedings in this case, and hereby finds and determines as follows:

1. The total net liquidation value, within the meaning of Section 306(c)(4)(A) of the Rail Act, of the rail properties conveyed by CNJ and its affiliates pursuant to Section 303(b) of the Rail Act, is $42,509,299 as of April 1, 1976.

2. The value of other benefits, within the meaning of Section 306(c)(4)(B) of the Rail Act, provided to CNJ and its affiliates, and each of them, is zero.

3. The compensable unconstitutional erosion, within the meaning of Section 303(c)(1)(A)(i) and Section 306(c)(4)(C) of the Rail Act, suffered by CNJ and its affiliates, and each of them, is zero.

4. The following proceedings are established in order for the Court to determine the proper allocation among CNJ and its affiliates of the total net liquidation value set forth in paragraph 1, above.

a. Within 15 days of the date of this Order CJI shall file with the Court a statement containing its proposed allocation of the total net liquidation value set forth in paragraph 1, above, including a general explanation of how that allocation was made and furnish a copy of such statement, together with information as to the deadlines established herein, to the following:

i. each individual or entity who is a stockholder or creditor of any of the affiliates named above, and any other individual or entity holding a vested or contingent interest in the amount to be determined under Section 306(c)(4) of the Rail Act as the base value of the certificates of value of any of such affiliates; and,

ii. each individual or entity holding a vested or contingent interest in any securities issued pursuant to CJI's Plan of Reorganization which, pursuant to that Reorganization Plan, are to be liquidated from the proceeds (including interest) of this litigation.

b. Within 15 days of the date of this Order, CJI shall furnish to the Government Parties copies of all workpapers and any other documents necessary to understand how CJI arrived at its proposed allocation of the total net liquidation value set forth in paragraph 1, above, and CJI shall make available for inspection, at a convenient location and upon reasonable notice, a copy of all such workpapers and other documents to any individual or entity described in subparagraph a, above.

c. Within 45 days of the date of this Order, any person objecting to CJI's allocation among CNJ and its affiliates of the total net liquidation value set forth in paragraph 1 above, shall file with this Court a statement setting forth such objections together with a memorandum explaining each objection and its proposal(s) for an alternative allocation.

d. Upon receipt and consideration of such objections, the Court will determine if a hearing should be held. If no objections are received, the Court will enter an order approving the allocation proposed by CJI.

Appendix L

This order and the findings and determinations made herein shall not be effective and shall not constitute a finding or determination within the meaning of Section 303(d) of the Rail Act until the entry of Final Judgment by this Court making findings and determinations pursuant to Section 303(c) of the Rail Act.

HENRY J. FRIENDLY

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

Roszel C. Thomsen
Judge

Dated: December 5, 1983

APPENDIX M

Appendix M

IN THE SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed Dec 5 1983, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

Memorandum Accompanying Judgment under § 306(c)(4) of the Rail Act on Valuation of the Central Railroad of New Jersey and the Lehigh & New England Railway for Nonrail Use

Before FRIENDLY, Presiding Judge, and WISDOM and THOMSEN, Judges.

PER CURIAM:

On September 20, 1983, this court filed its opinion (Reconsideration Opinion) on petitions for reconsideration of its opinion of July 12, 1983, with respect to the valuation of the Central Railroad of New Jersey (CNJ) and the Lehigh & New England Railway (L&NE) for nonrail use. We directed the parties to proceed in accordance with the final paragraph of our opinion of July 12 (CNJ opinion) which required them within 21 days to submit an agreed judgment fixing the net liquidation value of the properties conveyed or, if they were unable to agree, separate proposed judgments together with memoranda explaining the points of difference. At the request of the parties we extended the date for doing this to November 1, 1983. We then received proposed judgments and memoranda from CNJ and the GPs and a statement from the Receiver of the L&NE.[1] The CNJ and the

1. The statement recited that the Receiver and the GPs had agreed on a net liquidation value (NLV) of $1,997,000.00 for the property conveyed by the L&NE and that the issues of VOB and CUE should not be litigated, but requested that we defer the entry of judgment until

GPs have agreed that value of other benefits (VOB) and compensable unconstitutional erosion (CUE) shall be taken as zero, as have the various settlements we have approved, see also fn. 1, and the judgments submitted by both sides make provision to that effect. The GPs' memorandum also advises (p. 3) that "a great number of minor differences as well as several items involving more significant values have been compromised," and that agreement had been reached with respect to the NLV of the Raritan River as well as of the L&NE. However, the parties have been unable to resolve their differences with respect to four points, which they submitted to us for decision. We shall discuss these in the order in which they are presented in the GPs' memorandum:

I. Discounting

In the CNJ opinion, we rejected CNJ's claim that real estate proceeds, projected to be received over a period of time after July 1, 1976, did not need to be discounted to net present value as of that date (pp. 28-31). We found that eight years was a realistic schedule for disposition of such properties (p. 35). In the Reconsideration Opinion we directed that "all proceeds and expenses for a given year should be treated as being received or paid at the mid-point of the year" (p. 13).

Despite the seeming clarity of these rulings, CNJ now claims that all of the first year's proceeds should be regarded as having been received on April 1, 1976—with no appreciation being computed or discount taken. In the second year it appreciates base values and applies discounts for only six months. By following this procedure for each following year, CNJ eliminates a full year of discount, thereby adding $1,520,961 to the figure that would otherwise obtain.

CNJ seeks to justify this result on the basis of the time before April 1, 1976, which its Trustee would have had to expend in

after a hearing before the District Court for the District of New Jersey on November 14, 1983; the GPs agreed with this.

negotiations, which would have been concentrated on the more valuable properties. But the CNJ opinion (pp. 33-35) shows that we took account of precisely these facts in fixing a pace of sale much more favorable to CNJ than the GPs had proposed, with 35% of the real estate values being realized in the first year. CNJ's present proposal would involve double counting, is clearly contrary to our opinions, and should not have been made.

II. Addition of 3% per annum for Depreciation

In the CNJ opinion, Part III.B.3., under the general heading "Adjustments to Base Value" and the subheading "Discount to Present Value," we dealt, at pp. 35-37, with CNJ's contention that amounts realized from the sale of real estate after April 1, 1976, should be adjusted upwards from base value because of post-April 1, 1976 appreciation. After noting difficulties with the GPs' approach to this problem and the absence of any comprehensive treatment by CNJ, we found "that, as a matter of judgment applied to the record, 3% per annum should be added to real estate base values to reflect appreciation not taken into account in the GPs' figures." The GPs read this as meaning what it says. "Base value" is defined in fn. 10 to mean "the market value of the conveyed parcels as of the valuation date, April 1, 1976, before adjustment for title defects, discounting to present value, holding costs, and selling expenses." As the structure of the opinion makes clear, allowance for appreciation is a part of the discounting process. The GPs have therefore applied the 3% annual appreciation allowance to the base values found (pp. 20-21) or stipulated, in accordance with our findings (p. 35) with respect to the pace of sale.

CNJ proposes instead to add this 3% appreciation allowance to the appreciation rates, ranging from 0% to 5%, to which the GPs' experts had testified for various counties and types of property, and then apply the sum to the base values. This is not a fair

reading of the CNJ opinion. CNJ argues that use of a 3% rate in the hypothetical case on p. 37 of the opinion unsurprisingly would produce less than a 5% rate, which we thought inadequate if the property had in fact appreciated by 50% before being sold in the third year, whereas, an 8% rate would come closer to the actual figure. This elementary arithmetic overlooks that, as the CNJ opinion states (p. 37), there were only a few cases where the GPs' experts had recognized rates as high as 5% per annum. Our objective was to provide, as a matter of judgment, an overall appreciation rate to be applied to the new base values found in the CNJ Opinion. We thought, and still think, we had made that clear. If we did not, we do so now.

The GPs and CNJ agree that if allowance is to be made for appreciation of the values of the real estate, some upward adjustment should also be made for interim income from such property—a point which we overlooked. They differ with respect to the appreciation rate. CNJ advocates the same 3% rate used for appreciation of the base values. The GPs contend that, for reasons developed in their memorandum, interim income would not increase so rapidly and propose a figure of 1½%. We agree with the GPs.

III. Discounting of Proceeds of Assets other than Real Estate

CNJ's theory that no discount should be applied to proceeds received in the first year after April 1, 1976, leads it to propose that no discount be applied to the proceeds from non-real estate assets, for which the GPs' evidence established liquidation periods ranging from nine to fourteen months. We find no sufficient basis in the record to support CNJ's assertion that payment for all these assets could have been received on or shortly after April 1, 1976. Indeed, it would have been impossible for CNJ to deliver these assets on the date when operations ceased even on the

assumptions, favorable to CNJ, which we have made in rejecting the GPs' proposal for a deduction for winddown costs, CNJ opinion, pp. 78-81. We thus uphold the position of the GPs on this point also.

IV. The Value of CNJ's Interest in the Raritan River R.R.

The CNJ opinion referred, fn. 1, to the fact that as owner of 49.9% of the preferred stock of the Raritan River R.R. CNJ was entitled to 49.9% of the first $1,981,600 of the value of the Raritan River,[2] and, as owner of all the common stock, to any amounts above that figure. We did not make any valuation of the Raritan River, but the CNJ and the GPs have agreed that its NLV as of April 1, 1976, was $1,733,000. It would seem that the ensuing calculation should be quite straightforward. Since the agreed NLV of the Raritan River was less than $1,981,600, an addition of $863,034 ($1,733,000 x .498) should be made to CNJ's certificate of value under § 306(c)(4)(A), and interest on that sum at a compounded annual rate of 8% would be added under § 306(c)(4)(D). This is what the GPs propose.

In a complete change of front from positions previously taken, CNJ would now add to the $1,733,000 NLV of the Raritan River $1,413,608 of statutory interest to December 31, 1983, for a total of $3,146,608. Of this CNJ would receive $987,000 as 49.8% of the first $1,981,600, plus the excess of $3,146,608 over $1,981,600, to wit, $1,165,008, for a total of $2,152,008. This sleight of hand results in CNJ's receiving $2,152,008, whereas the owner of the remaining 50.2% of the preferred stock receives approximately $994,600.

Interest cannot so easily be transmuted into principal. If it had been possible to compute and pay the amount due on April 1,

2. It now turns out that the correct figure is 49.8%. The balance of the preferred stock was owned by the Penn Central and, by virtue of the settlement with the Penn Central, is now owned by the Government.

1976, CNJ would have received $863,034, which it could have used as it saw fit, as the owner of the other 50.2% of the preferred stock could have done with the slightly higher amount receivable by it. CNJ is entitled to that amount plus statutory interest and no more.

The only other difference between the proposed orders making findings and determinations pursuant to § 306(c)(4) of the Act submitted by CNJ and the GPs is that the CNJ proposed order would have the court now determine that the total amount of the NLV should be allocated between itself and six affiliated transferors in a manner proposed by it, whereas the GPs' proposed order would direct CNJ to file its proposals[3] and give the affiliates an opportunity to object. We deem the GPs' approach to be preferable. Accordingly, we are signing the order under § 306(c)(4) proposed by them.

Entry of an order under § 306(c)(4) does not end our obligations with respect to CNJ in these proceedings; we must then enter an order under § 303(c). CNJ has indicated that it wishes to raise three points in connection with such an order. These are: (1) a claim for severance damages with respect to the Newark Bay Bridge; (2) a claim that the compounded annual 8% rate of interest with respect to the certificates of value provided in § 306(c)(4) is constitutionally inadequate; and (3) a claim that, for a variety of reasons, the NLV of the CNJ as determined by this court does not satisfy the concept of constitutional minimum value. CNJ observes that it believes this court has rejected the third claim, citing pp. 81-82 of the CNJ opinion[4]—an observation in which we concur. Seemingly, it does not wish to produce further evidence or engage in further argument on this claim, which would be fruitless so far as this court is concerned, but desires only that our overruling of its position be again reflected in

3. These will now have to be altered to conform to this memorandum.

4. Reference should also be made to our CMV opinion, 445 F. Supp. 994 (1977).

the § 303(c) judgment in order to insure its consideration by the Supreme Court, if the Court is so advised. While the first two claims have been the subject of some testimony and comment, they have never been presented to us in a form enabling us either to pass upon our jurisdiction to decide them or, if we have this, to rule upon them. CNJ has presented an order to show cause with respect to further proceedings under § 303(c) but we find this unsatisfactory, in part because it would take the parties into extensive exploration of the facts before we determine whether we have jurisdiction or, if we find that we do, whether CNJ would be entitled to relief even on its own version of the facts.

We direct the parties to proceed as follows:

1) Within 14 days after the entry of our order under § 306(c)(4), the GPs shall file and serve on CNJ a motion for the entry of an order under § 303(c) in a form which shall be attached to the motion.

2) Within 17 days after the filing and service of the GPs' motion, CNJ shall file and serve an answer setting forth its objections to the entry of the proposed order. The answer shall be accompanied by a memorandum and/or affidavits. These shall include a statement of the relief which CNJ desires and a further statement whether CNJ believes this court has jurisdiction to grant such relief and, if so, why; the facts and the law contended to be relevant to each objection; and an offer of the proof which CNJ would propose to present in its support.

3) Within 14 days after the filing and service of CNJ's answer, the GPs shall file and serve a reply. The reply shall be accompanied by a memorandum and/or affidavits. These shall state the position of the GPs with respect to the jurisdiction of this court to grant the relief sought by CNJ and the reasons for such position, and the GPs' position on the merits, and shall also indicate the nature of the

proof which the GPs would submit if this court should decide that it may and should entertain CNJ's objections.

HENRY J. FRIENDLY

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

Roszel C. Thomsen
Judge

Dated: December 5, 1983

APPENDIX N

Appendix N

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed Jun 15, 1984, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

CNJ OPINION ON INTEREST AND SEVERANCE DAMAGE

Before FRIENDLY, *Presiding Judge,* and WISDOM and THOMSEN, *Judges.*

FRAZER C. HILDER, UNITED STATES RAILWAY ASSOCIATION, WASHINGTON, D.C., FOR UNITED STATES RAILWAY ASSOCIATION.

STANLEY WEISS, DEAN R. MAY, AND ALEXANDER COHEN, CARPENTER, BENNETT & MORRISSEY, NEWARK, NEW JERSEY, FOR CENTRAL JERSEY INDUSTRIES, INC.

LAURENCE Z. SHIEKMAN, KENNETH I. LEVIN, PEPPER, HAMILTON & SCHEETZ, PHILADELPHIA, PENNSYLVANIA, FOR CONSOLIDATED RAIL CORPORATION.

FRIENDLY, *Presiding Judge:*

This court filed an opinion on July 12, 1983, *CNJ Opinion*, 571 F. Supp. 1269, and, on September 20, 1983, an opinion on reconsideration, *id.* at 1335, fixing the net liquidation value (NLV) of the Central Railroad of New Jersey (CNJ) (now, as a result of reorganization, Central Jersey Industries, Inc.), including the

Lehigh & New England Railway. The latter opinion, *id.* at 1340, directed the parties to proceed as instructed by the final paragraph of the former, *id.* at 1335. This required them to indicate, at the time when a proposed judgment or proposed judgments were submitted,

> whether they agree that the court may take the net liquidation value as the base value of each certificate of value under § 306(c)(4) of the Act or whether either side desires to litigate the issues of the value of other benefits and compensable unconstitutional erosion as provided in §§ 306(c)(4)(B) and (C).

Central Jersey Industries, Inc. (CJI) filed a memorandum dated November 1, 1983. This took the position that although the parties were willing to agree that the values of other benefits and compensable unconstitutional erosion were zero (as had been done in the various settlements we have approved) and the case was therefore ripe for the entry of judgment fixing the base value of the certificates of value (CVs) under § 306 of the Rail Act, we must pass on three other issues before we could properly enter judgment under § 303 that the conveyance in exchange for the CVs was fair and equitable. These were:

> (a) the severance damage caused to CNJ's retained Newark Bay Bridge property by the mandated conveyances;
>
> (b) the constitutional insufficiency of the interest accruing at an 8% compound annual rate on the certificates of value; and
>
> (c) the values transferred for ConRail's continued use which are not adequately measured by the net liquidation valuation standard called for in Section 306.

CNJ Memorandum In Support of Proposed Form of Judgment at 1.

On December 5, 1983, we entered an order finding that the total net liquidation value, within the meaning of § 306(c)(4) of the Rail Act, was $42,509,299 as of April 1, 1976 and, in accordance with the agreement of the parties, that the values of other benefits and of compensable unconstitutional erosion were zero. In an accompanying memorandum, also dated December 5, 1983, we explained how we had arrived at the figure. We also stated that

> [e]ntry of an order under § 306(c)(4) does not end our obligations with respect to CNJ in these proceedings; we must then enter an order under § 303(c).

We took note of the three points CNJ desired to raise, agreed with its concession that we had already rejected the third, and prescribed steps designed to assist us in formulating an order with respect to further proceedings under § 303(c). Although we had raised the question of our jurisdiction to consider CNJ's claims, both sides agreed that we had this. They relied upon § 303(c)(1)(A), which requires us to find whether the transfers or conveyances in exchange for the CVs "are in the public interest and are fair and equitable" to the transferor, and upon § 209(e)(B), which gives us original and exclusive jurisdiction of any civil action "challenging the constitutionality of this Act or any provision thereof."[1] Our order established procedures for the taking of further evidence, briefing and oral argument.

"*Fair and Equitable*"

On three previous occasions we have addressed ourselves to the meaning of the phrase "fair and equitable" in § 303(c)(1)(A) and the related issue whether

> the Act involves a taking and, if so, whether the "constitutional minimum" required both by the terms of the Act

> and by the Fifth Amendment differs if the Act should be regarded as a reorganization statute enacted under the bankruptcy power or as a statute enacted under the commerce power or as both.

CMV Opinion, 445 F. Supp. 994, 999-1000 (1977). In our Memorandum and Order dated June 16, 1976, printed as a appendix to our opinion of October 18, 1976, 425 F. Supp. 266, 276, we noted the question, raised in our letter of March 9, 1976, which led to the Memorandum, what function these words served,

> especially in view of the facts (a) that if the consideration is "fairer and more equitable than is required as a constitutional minimum," § 303(c)(3) requires us to eliminate the excess, and (b) that if the consideration were less than the constitutional minimum, it would not be fair and equitable.

Id. at 279. We went on to say:

> Almost all, perhaps all, the statements seem to agree that the fair and equitable language serves no significant function in the determination of the value of any particular property .... Accordingly the Court will consider the "fair and equitable" issue to have been removed from the process of valuing the properties of individual estates or other transferors unless this is raised in the briefs to be filed as above indicated; any person taking such a position shall state with precision and not merely in conclusory terms how the "fair and equitable" test differs from the constitutional minimum test with respect to valuation in the context of the Act as it now stands.

Id. In the October 18, 1976 opinion we said, to much the same effect, 425 F. Supp. at 269 (footnote omitted):

> Here again most of the parties share our inability to discern why, under the terms of the Rail Act, the requirement that we find that the consideration is more than, less than, or equal to the "constitutional minimum" does not drain the "fair and equitable" language of all meaning as regards the adequacy of the total consideration to be received by each transferor.[2]

In our *CMV Opinion*, *supra*, 445 F. Supp. at 1000, we noted that the issue had

> lost much of what once seemed to be its significance because of the concession of the Government parties (Brief at 12):
>
> > We do not contend that the Act cannot involve a "taking" or that the Fifth Amendment standard differs depending on which powers Congress invokes.
>
> *See also id.* at 14-15.

Since then the court and all the parties have proceeded on the basis that the fair and equitable standard of § 303(c)(1)(A) requires the "just compensation" mandated by the Fifth Amendment, neither less nor more. No one in these proceedings has argued to the contrary.

The Interest Claim

Under the Rail Act, as enacted in 1974, Pub. L. No. 93-236, §§ 206(d), 303(a), (b), 87 Stat. 985, 996, 1005-06, transferors of rail properties pursuant to the Final System Plan (FSP) were to be compensated with securities of Conrail and obligations of the United States Railway Association (USRA), with any "short-fall" to be recovered by an action in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, see *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 123-36, 148-56 (1974).

Appendix N

The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, § 610(b), 90 Stat. 31, 104-05, amended the Rail Act so that payment was to be in "certificates of value", outlined in newly created § 306. The certificates of value were to be guaranteed by the Secretary of Transportation and to "constitute general obligations of the United States of America for the payment or redemption of which its full faith and credit are pledged", § 306(a). They were to be redeemed by USRA on December 31, 1987, or on such earlier date as USRA's Board of Directors and Finance Committee might jointly specify, § 306(c)(1). The redemption price of each certificate was to be its "base value" on the redemption date less the sum of the fair market value of Conrail securities attributable to such certificate, cash dividends thereon, and another item not here material, § 306(c)(2). The base value was to be, § 306(c)(4):

> the value obtained by (A) taking the net liquidation value, as determined by the special court, to which the transferor to whom such series of certificates of value is issued is entitled by virtue of transfers of rail properties, under section 303(b)(1) of this title to [Conrail] or a subsidiary thereof; (B) subtracting the value of other benefits provided under this Act, as determined by the special court; (C) adding such amount, if any, as the special court may determine shall be required after taking into consideration compensable unconstitutional erosion, if any, in the estate of a railroad in reorganization, of a railroad leased, operated, or controlled by such a railroad, which the special court finds to have occurred during any bankruptcy proceeding with respect to such railroad; (D) *adding interest from the transfer date to the redemption date to be compounded annually at a rate of 8 percent per annum;* and (E) dividing the resulting value by the number of certificates of value of such series distributed to such transferor. (Emphasis supplied.)

Appendix N

The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 1167(b), 95 Stat. 357, 686, repealed the provision of § 306(c)(2) requiring deduction for the value of Conrail securities, since these were now all to be owned by the United States. See S. Rep. No. 139, 97th Cong., 1st Sess. 341, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 629.

CNJ concedes that

> [a]t the time Section 306(c)(4) was enacted, early in 1976, the 8% rate of interest, compounded, was seemingly adequate.

CNJ Answer and Memorandum at 13 (Jan. 5, 1984) (footnote omitted). This concession is well-advised in light of the evidence that

> [t]en-year Treasury notes bearing 7⅞ percent and 8 percent respectively sold in May and August 1976 at or very near to face value (*see* Treasury Bulletin, May 1976 at V, August 1976 at V, 81; September 1976, at 72), and on March 31, 1976, the average yields of Treasury securities outstanding indicated a 7.7 percent return for securities maturing in 1987.* *Id.*, April 1976, at 89.

GPs Reply in Support of Proposed Final Judgment at 26 n.26 (Jan. 19, 1984). CNJ's claim is that what appeared to be a fair interest rate when the Rail Act was amended in 1976 has ceased to be so in light of the increase in such rates and that the allowance of only 8% interest, compounded annually, deprives it of the just compensation required by the Fifth Amendment for the delay in payment.

It is not disputed that when the Government takes property and defers payment, it must compensate the owner for the delay. In addition to the oft-quoted general statements in *United States* v. *Miller*, 317 U.S. 369, 373 (1943) (footnote omitted), that the compensation provided by the Fifth Amendment "means the full and perfect equivalent in money of the property taken", citing

Monongahela Navigation Co. v. *United States*, 148 U.S. 312, 326 (1893), and that "[t]he owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken", 317 U.S. at 373 (footnote omitted), the Court said expressly in *Seaboard Air Line Railway* v. *United States*, 261 U.S. 299, 306 (1923):

> The requirement that "just compensation" shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation. Where the United States condemns and takes possession of land before ascertaining or paying compensation, the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount to be added.

The Court has reaffirmed this very recently when it said in *Kirby Forest Industries* v. *United States*, 52 U.S.L.W. 4607, 4610 (May 21, 1984), that "if disbursement of the award is delayed, the owner is entitled to interest thereon sufficient to ensure that he is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation." See, to the same effect, *Phelphs* v. *United States*, 274 U.S. 341 (1927); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); 3 Nichols, The Law of Eminent Domain § 8.63, at 8-293 (Sackman rev. 3d ed. 1981).

CNJ's claim is that although the 8% annually compounded rate was fair when Congress provided for the CVs in 1976, things did not turn out that way, and therefore the Fifth Amendment requires that corrective action must be taken now. At oral argument on May 16, 1984, counsel for CNJ stated that Treasury bonds with rates and maturities nearly corresponding to those of the CVs were selling around 86; the differential between this

figure and face value reflects the market's estimate how much 8% is less than a fair interest rate between May, 1984 and December 31, 1987.[3] Beyond this CNJ allegedly had suffered a large loss in the differential between 8% and market rates of interest in many of the eight years since the conveyance.

In recent years, as a result of the explosion of interest rates, determination of the rate of interest constitutionally required in various types of taking has received increased attention from courts of appeals and the Court of Claims. This issue was not faced by us in our initial decision sustaining the constitutionality of the Rail Act, *180 Day Appeals*, 384 F. Supp. 895 (1974), or by the Supreme Court in the *Regional Rail Reorganization Act Cases*, *supra*, 419 U.S. 102, since, as noted, the form of compensation then provided was different.

United States v. *Blankinship*, 543 F.2d 1272 (9 Cir. 1976), involved two takings by the United States in Oregon pursuant to the Declaration of Taking Act, 40 U.S.C. § 258a. That Act provides that title shall vest in the United States upon the filing in an appropriate court of a declaration of taking and deposit of the estimated compensation. When compensation is ultimately ascertained, the judgment

> shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

After reviewing Supreme Court decisions, including the *Miller* and *Seaboard Air Line Railway* cases cited above, the court of appeals concluded, in agreement with the district court, that "the Fifth Amendment under certain circumstances does require the use of a rate of interest in excess of 6 percent", 543 F.2d at 1274.[4] However, it disapproved the method by which the district court

had computed rates of 8.5% for one parcel and of 8% for another. These had been reached on the basis of evidence pertaining to the commercial "prime rate", the rates applicable to three- and six-months certificates of deposit issued by certain Oregon banks, and ninety- and 180-day Treasury bills. The Ninth Circuit noted that this mix included "obligations not as riskless as those of the Treasury"; it believed that "the trial court should have focused more on that type of marketable public debt security which constitutes a direct obligation of the United States Treasury having a duration approximately the period during which the deficiency was unpaid." 543 F.2d at 1276. That, as we have seen, is exactly what Congress did with respect to the CVs; indeed, it provided for the annual compounding of interest, a factor with which the Ninth Circuit did not expressly deal. So viewed, the case would be an authority against CNJ, not for it. Operating somewhat against this, however, is the court's statement, *id.* at 1277:

> We also acknowledge that the marketability of a claim against the United States for a deficiency under the Declaration of Taking Act is considerably less than that of a marketable public debt security of the United States. Some allowance for this feature by the trier of fact is not unreasonable.

In fact the marketability of the condemnee's deficiency claim against the United States would seem to have been nearly nil, since no one could know what the amount of the claim would be or when it would become due. In the former respect but not in the latter, the case is like CNJ's.

A few months later the Court of Claims decided *Pitcairn* v. *United States*, 547 F.2d 1106 (Ct. Cl. 1976) (en banc) (per curiam), *cert. denied*, 434 U.S. 1051 (1978). This involved claims of an inventor for patent infringement by the United States, 28 U.S.C. § 1498, and the pertinent question was the

fixing of appropriate rates of "delay compensation" on the royalty payments which it was determined the Government should have made over a long period from 1947 to 1975. In contrast to *Blankinship*, there was no applicable statute. A majority held that it was reasonable to divide the delay period into several periods and to fix rates rising from a low of 4% for 1947-1955 to a high of 7½% for 1971-1975. 547 F.2d at 1121. This was based on "evidence of record relating to the trends indicated by Moody's Composite Index of Yields on Long Term Corporate Bonds". *Id.* The court rejected the Government's claim that a more appropriate reference point was "the average annual yields of a series of hypothetical long term government bonds, in effect, the cost to the Government of borrowing money", as running counter to "the established rule of eminent domain that damages should be determined by what the condemnee has lost, not what the taker has gained." *Id.* at 1122. This reasoning overlooked the peculiar relevance of the yields on government obligations, which is what the claimant is given—however correct the actual decision may have been with respect to the "hypothetical" long-term bonds proffered as evidence. The reason why government bond yields are of peculiar relevance, as pointed out by Judge Sneed in *Blankinship*, 543 F.2d at 1276, and by Judge Skelton, concurring in part and dissenting in part in *Pitcairn*, 547 F.2d at 1128-30, is that they are free of the risk of default.

In *Tektronix, Inc.* v. *United States*, 552 F.2d 343, 352 (Ct. Cl. 1977) (en banc), *cert. denied*, 439 U.S. 1048 (1978), the court directed that the *Pitcairn* rates be applied to all future just compensation cases "unless and until it is affirmatively demonstrated that under the theory of the *Pitcairn* opinion the rate for years after 1975 should differ from the 7½% rate set for 1971-75." Consistently with his opinion in *Pitcairn*, Judge Skelton, concurring in part and dissenting in part, would have remanded

> this part of the case to the trial judge with instructions to fix the interest rate for the periods in question according to

> the yield of Government obligations with duration approximating the periods of time from the date of each taking until paid, and that once the interest rate was determined for each taking, it would remain constant until paid.

Id. at 356.

In *Miller* v. *United States*, 620 F.2d 812 (Ct. Cl. 1980), the Court of Claims was confronted with a case where, in contrast to the *Pitcairn* and *Tektronix* cases, Congress had provided, in the Act of Oct. 2, 1968, Pub. L. No. 90-545, § 3(B)(2), 82 Stat. 931, 932, 16 U.S.C. § 79c(b)(2), relating to the expansion of Redwood National Park, for a 6% rate of interest from the date of taking to that of judgment. The trial judge applied this, relying on the fact that at the time of the taking, October 2, 1968, "6 percent was in excess of the rate of interest paid by the United States Treasury on all governmental obligations regardless of term." 620 F.2d at 838. The court held this to be error, citing a number of cases, including the three just discussed, as showing "that the courts have looked to the interest rates prevailing in the years between the date of taking and the date of payment." *Id.* The court thought "[i]t would be possible for the courts to fix the interest rates received by any condemnee in the same manner as defendant suggests, *i.e.*, by reference to the prevailing rate of interest at the time of taking", and also noted that "[a] superficial reading of Pub. L. No. 90-545 might indicate that Congress intended to establish a different treatment for redwood park landowners." *Id.* However, it perceived "a strong judicial policy in favor of the establishment of a uniform rate of interest applicable to condemnation cases in order to avoid discrimination among litigants" and therefore decided to "construe Pub. L. No. 90-545 as establishing the same manner of treatment for redwood park condemnees as that for other condemnees." *Id.* at 838-39. It went on to say, *id.* at 839 (footnote omitted):

> The keystone to defendant's argument in favor of limiting the rate of interest to 6 percent is its analogy of plaintiffs' situation to a person who has bought a Government obligation in 1968 at the then current interest rate of 6 percent. This analogy has several flaws. No reasonable investor would purchase an obligation with both an uncertain date of maturity and an uncertain amount of principal payable at maturity. Plaintiffs had their business property involuntarily converted into an extremely illiquid claim against the United States. Since plaintiffs' options for other investments were effectively cut off, just compensation in this case should include payments for delay of compensation measured by the interest rates prevailing between the taking and payment dates. The Government, not the unwilling condemnee, should be the one to bear the risk of any fluctuations in interest rates.

The court applied the *Pitcairn* rates through 1975 but thereafter, taking judicial notice of Moody's rates for long-term Aaa corporate bonds, applied a rate of 8½% for the years 1976-1979 and of 12% for the year 1980 to the date of payment, although stating that the 12% rate would not be regarded as a precedent. *Id.* at 840. Apparently these rates were, as in *Pitcairn*, simple interest. The Court of Claims reaffirmed this approach in *Georgia-Pacific Corp.* v. *United States*, 640 F.2d 328, 365-67 (1980) (per curiam)—another Redwood National Park taking.

In addition to the criticism of use of long-term corporate bond yields made by Judge Sneed in *Blankinship, supra*, 543 F.2d at 1276, namely, that they do not reflect the risk-free character of government obligations, which the condemnee in effect held, resort to *any* varying long-term bond yields to measure "delay compensation" is subject to a more fundamental criticism if, as here, such yields climb from period to period.[5] This is that it would have been impossible for CNJ to shift from year to year from long term bonds with lower to higher rates as bond yields

increased without incurring substantial capital losses.[6] Rather than pressing these lines of attack, the Government Parties (GPs) rely on the fact, not disputed by CNJ, that use of the *Pitcairn-Tektronix-Miller* approach of the Court of Claims would not produce delay compensation for CNJ significantly higher than the 8% compound interest provided for in § 306(c)(4)(D) unless it were to be supplemented by incorporating an element which the Court of Claims has declined to add, namely, compound rather than simple interest. In other words, acceptance of CNJ's proposal, rather than producing the uniformity which the Court of Claims deemed desirable, would place CNJ in a preferred class.

While eagerly embracing the Court of Claims' approach in other respects, CNJ says that in using simple rather than compound interest the Court of Claims has been wrong. It points out that interest payments on bonds are generally made semiannually, thereby enabling the holder to earn interest on interest. For authority CNJ relies on *United States* v. *429.59 Acres of Land*, 612 F.2d 459, 464-65 (9 Cir. 1980). Compensation for a taking there was fixed by a Commission appointed under Fed. R. Civ. P. 71A(h), whose factual findings enjoyed the protection of the "unless clearly erroneous" rule, see Fed. R. Civ. P. 53(e)(2). The Commission found the appropriate interest rate for a period between May, 1971 and the time of its report to be 6.635% on the basis of average yields on a composite of four securities—six-month Treasury bills, four- to six-month prime commercial paper, ninety-day prime bankers acceptances, and six-month bank certificates of deposit. It then compounded that rate annually to arrive at a figure of 7.4% per annum. 612 F.2d at 465. The court held that the Commission had not clearly erred either in not considering government obligations with maturities greater than 180 days, as it had suggested in *Blankinship, supra*, 543 F.2d at 1274, or in compounding interest. With respect to the latter it said, 612 F.2d at 465:

> Compounding of interest is appropriate to compensate the landowners for the loss of use of the interest that the deficiency award would have been producing for them during the interim.

Contra, United States v. *97.19 Acres of Land*, 511 F. Supp. 565, 570 (D. Md. 1981) (following Court of Claims' use of long-term corporate Aaa bond interest but declining to compound on the basis that "the Court of Claims formula adequately compensates a property owner for deprivation of the deficiency amount"). The most that CNJ can extract from *429.59 Acres, supra*, is that compounding of interest is not improper *when the interest yield has been computed on an appropriate basis.* We consider that, in the usual case, this would be either the yield on government bonds purchased at the time of the taking and maturing at the date of payment, as suggested by Judge Sneed for a majority in *Blankinship* and by Judge Skelton dissenting in *Tektronix*, with such adjustment, if any, as may be proper because of illiquidity, or yields on short-term government obligations.[7]

The first of these alternatives is what CNJ already has under § 306(c)(4)(D), subject only to the problem of marketability noted in *Blankinship*. We decline to consider the second since we do not subscribe to CNJ's thesis that, under the unique circumstances of this case, we can properly set aside the carefully considered determination of Congress, conceded by CNJ to have been reasonable at the time, that interest of 8% compounded annually constituted just compensation for the delay necessarily incident to the computation of the NLV and CMV of the railroads' properties.[8]

In saying this we recognize the famous statement in *Monongahela Navigation Co.* v. *United States*, supra, 148 U.S. at 327, that

> [t]he legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been

> ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Accord, United States v. *New River Collieries Co.*, 262 U.S. 341, 343-44 (1923). However, it does not follow from these general statements that when delay compensation is an integral part of a broad Congressional plan to preserve essential railroad service in the Northeast and to enable the bankrupt railroads in that region to receive billions of dollars from the Federal Treasury in compensation for properties whose operations were grinding to a halt, we are bound to treat the decision of Congress as if it did not exist. The decision was rational not only in the sense that 8% compound interest on a government obligation with a maturity of eleven years and eight months was fair, as it concededly was, but in the broader sense that CNJ has adduced no evidence that anyone was then aware that interest rates would climb precipitously.[9] Moreover, the decision clearly was a considered one. Congress did not adopt the time-honored 6% simple interest provision of the Declaration of Taking Act, 40 U.S.C. § 258a; instead it provided a much more generous 8% compound interest rate. See S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 140, *reprinted in* 1976 U.S. Code Cong. & Ad. News 148, 155; H.R. Conf. Rep. No. 781, 94th Cong., 2d Sess. 140 (1976). When the New York Court of Appeals upheld the application of general statutory interest rates of 6% simple interest in condemnation cases, *County of Nassau* v. *Eveandra Enterprises, Inc.*, 42 N.Y.2d 849, 850, 397 N.Y.S.2d 627, 628 (1977), saying "[s]o long as the statutory rate constitutes a judicially acceptable, fair return for the deprivation of the use of that property or the money equivalent of that use, either or in combination, the statutory rate should be considered proper",

the Supreme Court dismissed the condemnee's appeal "for want of substantial federal question." 434 U.S. 804 (1977).[10] This seems to us to apply *a fortiori* to a recently enacted statute designed to deal with a particular complex situation.[11]

As noted, we need not and do not go so far as to say that whenever Congress provides a rate of interest for delay compensation that is reasonable at the time of enactment, that rate necessarily remains so. This is not the ordinary case where government, for a public purpose, deprives a citizen of property which he would have preferred to keep for his own use. Continued operation was the last thing the railroads wanted; it was something they had neither the desire nor the ability to perform. See *CMV Opinion*, *supra*, 445 F. Supp. at 1017 (The railroads "have no desire to be put in a financial position that will enable them to build another railroad; they want to exit from the railroad business, not enter it."). The Rail Act, as we said in our first opinion, "was a Congressional response to the threat to the national welfare posed by the bankruptcy of the railroads in the northeastern United States .... These bankruptcies differed from earlier railroad insolvencies in an essential respect. Whereas earlier insolvencies had typically been caused by inability to meet fixed charges or debt maturities, the causes of [the] railroad bankruptcies [of the late 1960's and early 1970's]in the northeastern region went much deeper; the roads were unable to pay taxes and operating expenses, even with substantial undermaintenance of plant which, in turn, led to revenue losses and increased expense, particularly for freight car hire." 384 F. Supp. at 902-03. Recognizing this, Congress made numerous provisions in the Rail Act, see *id.* at 909-10, granting financial aid to enable the railroads to keep alive between the date of enactment, January 2, 1974, and the date of conveyance, which turned out to be April 1, 1976. The desperate financial condition of these railroads is further detailed in our *CUE Opinion*, 439 F. Supp. 1351 (1977), and in our *Rail Use Opinion*, 531 F. Supp. 1191, 1215-17 (1981). Indeed the whole basis for the railroads'

claim of compensable unconstitutional erosion was that the Rail Act postponed the dates when they would otherwise have ceased operation.

CNJ was not immune from the conditions affecting the other northeastern railroads. Indeed, it had been the first to enter bankruptcy, on March 22, 1967, and, for reasons outlined in our *CUE Opinion*,[12] its situation in some respects was worse than that of other carriers. CNJ would doubtless respond that it was better off than other carriers in having a ready and willing purchaser, the State of New Jersey. However, as is implicit in our *CNJ Opinion*, 571 F. Supp. 1269, 1280-84 (1983), see also *Rail Use Opinion*, *supra*, 531 F. Supp. at 1382, the State would have taken full advantage of CNJ's lack of bargaining power. Indeed, CNJ's bargaining position with the State would have been peculiarly weak since the State was supplying the oxygen (in the form of subsidies) on which CNJ's life depended.[13]

Beneficial as the original Rail Act was to the affected carriers, the 1976 amendments made it even more so. One notable instance was the creation of the CVs as a means of payment in substitution for the limited amount of USRA obligations and Conrail securities provided for and the suit in the Court of Claims permitted by the 1974 Act for any excess of the value of the conveyed properties over the value of the allotted USRA obligations and Conrail stock. It was altogether legitimate for Congress, as part of such a comprehensive scheme, to fix the 8% compound interest which concededly appeared to be fair in 1976 as the amount of interest on the CVs. CNJ's plea for uniformity—more accurately for a preferred position, as we have shown—rings hollow in the context of the Rail Act, a unique piece of legislation designed to cope with a national emergency of unparalleled magnitude. If interest rates had declined, CNJ would hardly have agreed that the 8% compound rate made its compensation "more fair and equitable than is required as a constitutional minimum" under § 303(c)(1)(B). In this situation, unlike cases arising under the Declaration of Taking Act, 40

U.S.C. 258a, we see nothing in the just compensation clause that forbids us to accord appropriate respect to the fair and considered determination of Congress.[14]

The Newark Bay Bridge

The Newark Bay Bridge (Bridge) is a structure built by CNJ under authorization from Congress in 1919, Act of Aug. 8, 1919, ch. 42, 41 Stat. 277.[15] A subsequent statute extended the period during which CNJ was to commence and complete construction, Act of Feb. 21, 1921, ch. 47, 41 Stat. 1099. The authorizing statute provided that the Bridge was subject to the Bridge Act of 1906 hereafter discussed. The Bridge spans lower Newark Bay for some 1.4 miles between Elizabethport and Bayonne, New Jersey. The Final System Plan (FSP) provided for the conveyance to Conrail of CNJ's tracks immediately to the west and east of the Bridge but left the Bridge itself with CNJ.[16] As will be detailed below, the Coast Guard has decreed the Bridge to be a hazard to navigation and has ordered its removal. Since the Bridge is no longer used for rail purposes, the costs of this, estimated to be some $14,000,000, will fall on CNJ, whereas if it had continued to be used for rail purposes, most if not all the cost would have been borne by the United States. CNJ contends that this removal cost constitutes "severance damage" for which it is entitled to just compensation under the Fifth Amendment. In order to evaluate the claim it is necessary to review the applicable federal bridge legislation and the history of this long-standing problem.

The right to erect or maintain a bridge across any navigable waters of the United States or to build anything in such waters, has always been "subject to the paramount right of navigation." *Union Bridge Co.* v. *United States*, 204 U.S. 364, 398 (1907).[17] Section 4 of the Bridge Act of 1906, ch. 1130, 34 Stat. 84, 85, 33 U.S.C. § 494, states:

> No bridge erected or maintained under the provisions of [this Act] . . . shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed . . . .

The Government (Secretary of Transportation), "after giving the parties interested reasonable opportunity to be heard," may require the bridge owner to "alter the [bridge] as to render navigation through or under it reasonably free, easy, and unobstructed . . . . [A]ll such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating [the] bridge." *Id.* Section 18 of the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121, 1153-54, 30 U.S.C. § 502, provides criminal penalties for the willful failure of a bridge owner to comply with a lawful order "to alter the [bridge] as to render navigation through or under it reasonably free, easy, and unobstructed." Accordingly, until Congress enacted the Truman-Hobbs Act in 1940, "the owner of a bridge across a navigable stream was not entitled to any compensation for the alteration or removal of the bridge as a result of navigation needs." *Southern Railway Co.* v. *Tennessee Valley Authority*, 294 F.2d 491, 493 (5 Cir. 1961).

On June 21, 1940, Congress enacted the Truman-Hobbs Act, ch. 409, 54 Stat. 497, 33 U.S.C. §§ 511 *et seq.*, in order to ease the financial burdens that the Bridge Act of 1906 imposed on railroad bridge owners. Applicable only to bridges "over navigable waters of the United States . . . used and operated for the purpose of carrying railroad traffic, or both railroad and highway traffic," § 511, the Act covers Government-ordered "alteration[s]", defined as including "changes of any kind, reconstruction, or removal in whole or in part", *id.*; see § 516, and "relocation[s]", not defined in § 523. Pursuant to § 516, the cost of any alteration or relocation project is to be apportioned between the Government and the bridge owner as follows:

> *The bridge owner shall bear such part of the cost as is attributable to the direct and special benefits which will accrue to the bridge owner as a result of the alteration,* including the expectable savings in repair or maintenance costs; and that part of the cost attributable to the requirements of traffic by railroad or highway, or both, including any expenditure for increased carrying capacity of the bridge, and including such proportion of the actual capital cost of the old bridge or of such part of the old bridge as may be altered or changed or rebuilt, as the used service life of the whole or a part, as the case may be, bears to the total estimated service life of the whole or a part . . . . *The United States shall bear the balance of the cost, including that part attributable to the necessities of navigation* . . . . (Emphasis supplied).

In other words, the Act "would impose on the Government the total cost incurred in the interest of navigation, with suitable apportionment of the cost to the railroad covering special improvements to the benefit of the railroad, the remaining useful life of the facility, and the like." *Seaboard Coast Line Railroad* v. *Coleman*, 562 F.2d 1008, 1010 (5 Cir. 1977).

An order for "alteration" or "relocation" may be issued by the Secretary of Transportation (or his delegate, currently the Commandant of the Coast Guard) on making necessary findings and after complying with certain procedural requirements. See § 513. Any such order of the Secretary, however, must give "due regard . . . for the necessities of rail or highway traffic thereover." *Id.* Orders issued under §§ 516 and 523 are subject to review by the United States Court of Appeals for the circuit where the bridge is located. See § 520.

The Bridge's location rendered it an obstruction to navigation, which became more serious with the expansion of shipping in Newark Bay. Numerous accidents had occurred; between 1951 and 1970, the Coast Guard recorded twenty-one collisions of

vessels with the Bridge. A most serious collision in 1966 had "permanently damaged the easterly drawspan of the northern bridge," which was later removed. Exhibit GPS-Bd (Feb. 1982)-20, at 49-50.

In 1969 the Coast Guard, responding to a request from the American Institute of Merchant Shipping, began to investigate whether the Bridge was a navigational hazard. The preliminary investigation was conducted in preparation for proceedings under the Truman-Hobbs Act. The Coast Guard wrote the CNJ on September 5, 1969, asking about the latter's "long range plans" for the Bridge, referring CNJ to the Truman-Hobbs Act and explaining that under the statute, "if the bridge is determined by the Government to be obstructive and either alteration or replacement is directed, the federal government assists in the funding." Exhibit GPS-CNJ Bridge (Mar. 1984)-4. CNJ responded on October 29, stating that it had reviewed the procedures of the Truman-Hobbs Act and notifying the Coast Guard that the Bridge "is absolutely necessary [to CNJ's operations] for many years to come." Exhibit GPC-CNJ Bridge (Mar. 1984)-5. The Coast Guard's preliminary investigation concluded "that the bridge might be an unreasonable obstruction to navigation" and recommended instituting formal hearings pursuant to § 7 of the Truman-Hobbs Act, 33 U.S.C. § 513. See Exhibit GPS-CNJ Bridge (Mar. 1984)-6, at 1.

In preparation for the hearing held in April, 1970, several Coast Guard officials met with their counterparts at CNJ on February 25, 1970. The Coast Guard explained the provisions of the Truman-Hobbs Act and discussed with CNJ the possible methods for improving clearances for ships passing under the Bridge. See Exhibit GPS-CNJ Bridge (Mar. 1984)-7.

CNJ did not attend the April 1970 hearing, choosing instead to submit a letter from its chief engineer. That letter stated that "CNJ is in no position to assume any portion of the cost" of any alterations of the Bridge, and implied that CNJ intended to use the Bridge "in the foreseeable future". Exhibit GPS-BD (Feb.

1982)-20, at 123. The Coast Guard's Report on the Obstructive Character of the Central Railroad of New Jersey Bridge Across Newark Bay, dated October 24, 1972, concluded that

> the bridge, as it stands, is an unreasonable obstruction to navigation and that there is a need and justification for its replacement. It is recommended that [CNJ] be ordered to alter its railroad bridge . . . by replacing the existing bridge with a new bridge providing the required clearances, and to submit general plans and specifications for replacing the existing bridge . . . . The estimated cost is $14,267,700 of which amount the United States would pay $13,484,300 and [CNJ] $777,400 on the basis of apportionment of cost under Section 6 of the Truman-Hobbs Act.

Exhibit GPS-CNJ Bridge (Mar. 1984)-8, at 1. The Report also estimated the total cost of a complete removal of the Bridge and rerouting of CNJ's traffic to the Penn Central-Lehigh Valley Bridge (PC-LV Bridge), see *supra* note 16, to be about $10,000,000. *Id.* at 13-14.

In January, 1971, Mr. Timpany, who had become the CNJ Trustee, reexamined CNJ's need for a separate bridge over Newark Bay. He concluded that CNJ's traffic should be rerouted to the PC-LV Bridge; this would permit removal of the Bridge. See Timpany (S) (Feb. 1984) at 2. Negotiations then began with the Port of New York Authority (Port Authority), PC and LV and the Coast Guard, the inconclusive result of which will be discussed below.

Apart from the negotiations involving the Port Authority and PC and LV, the Coast Guard continued to try to resolve the Bridge problem with CNJ. On November 30, 1972, the Coast Guard notified CNJ that, pursuant to § 3 of the Truman-Hobbs Act, "it has been determined that [the Bridge] is considered to be

an unreasonable obstruction to navigation of the navigable channel." The letter outlined the "proposed plan of alteration" and stated that "[a] preliminary apportionment of [the estimated project cost of $14,261,700] has been prepared . . . , arriving at a tentative allocation of $777,400 to [CNJ] and $13,484,300 to the United States." The Coast Guard also explained that the apportionment of costs was based on an "exemplification of the principles of Section 6 of the Truman-Hobbs Act," a copy of which was enclosed, see Exhibit GPS-CNJ Bridge (Mar. 1984)-1. Lastly, the Coast Guard noted that "[a]s an alternative to the foregoing plan consideration should be given to rerouting [CNJ's] rail traffic over the existing [PC-LV Bridge]," an alternative that "could be accomplished by an agreement under the provision of Section 13 of the Truman-Hobbs Act." Exhibit GPS-CNJ Bridge (Mar. 1984)-10.

CNJ responded on January 25, 1973, stating "[a]t the outset . . . that in its present condition, CNJ has no funds available for participation in a project of the magnitude set forth in [the Coast Guard's Report], nor does it have access to any funds which would permit it to so participate." CNJ advised that its "present condition [is] that all interests would be best served if CNJ's rail traffic which presently traverses this bridge were transferred to the [PC-LV Bridge]." CNJ summarized its position as follows:

> [W]e are in favor of rerouting of CNJ's traffic and the elimination of the obstruction to navigation provided that:
>
> (1) no expense thereof be assessed against CNJ;
>
> (2) CNJ would be permitted to sell the [Bridge], presently valued in excess of $4,200,000,
>
> (3) CNJ would be reimbursed for any increased operating expenses resulting from the use of the [PC-LV Bridge],

> (4) CNJ would also be reimbursed for any construction cost involved in making any necessary connections in order to operate over the [PC-LV Bridge].

Timpany (S) (Feb. 1984) Exh. 13.

The Coast Guard again wrote to CNJ on April 16, 1973, requesting additional information on which to calculate the costs of removing the Bridge and rerouting CNJ's rail traffic; the Coast Guard reiterated:

> The costs of relocation of new construction . . . come under Section 13 [of the Truman-Hobbs Act] which provides that they should be apportioned between the bridge owner [CNJ] and the United States as provided in Section 6 (33 U.S.C. 516) of the Act.

Exhibit GPS-CNJ Bridge (Mar. 1984)-11.

CNJ responded on June 20, 1973, and repeated its position:

> CNJ believes that it is in the best interest of all parties involved to eliminate [the Bridge], rather than replacing it with a wider span. However, [CNJ] must again emphasize . . . [that] [t]he completion of the project must depend solely on funds other than those of CNJ, and CNJ must be totally reimbursed for its increased operating expenses, including annual usage payments to the [PC and LV].

Exhibit GPS-CNJ Bridge (Mar. 1984)-12.

Another aspect of the Coast Guard's plan to remove or alter the Bridge concerned what to do with the existing passenger service. Ultimately, the administration of New Jersey's Governor Byrne concluded that such service could be replaced with bus service. Initially, Governor Cahill's administration, which had taken office in January, 1970, supported the proposal to shift CNJ's freight traffic to the PC-LV Bridge and indicated that

"[a]lternative routes [for passenger service] may be completely acceptable to the [New Jersey] Department of Transportation both from a service and subsidy viewpoint." Timpany (S) (Feb. 1984) Exh. 8 (Letter from Robert J. Bussolt, Deputy Attorney General, New Jersey, to Robert L. Oswald, Secretary, ICC (Sept. 19, 1972)). Governor Cahill's loss in the June 1973 primary election prevented any action in the fall of 1973. See Timpany (S) (Feb. 1984) at 12; see also *CUE Opinion*, *supra*, 439 F. Supp. at 1382 & n.56.

On July 12, 1974, the new Commissioner of Transportation, Alan Sagner, met with the Coast Guard and indicated that he wished to delay any decision on the commuter service until the fall of that year "to allow time for the completion of a transportation study." Exhibit GPS-CNJ Bridge (Mar. 1984)-16. Commissioner Sagner continued to withhold a decision about the commuter service across the Bridge until April, 1975, when he notified the Coast Guard of the State's conclusion "that the bridge should not be demolished". Timpany (S) (Feb. 1984) Exh. 18. Three months later, however, in a meeting on July 11, 1975 with the Coast Guard and Port Authority, Commissioner Sagner agreed that the Bridge could be removed and bus service substituted for the commuter rail service. See Exhibit GPS-CNJ Bridge (Mar. 1984)-19. The parties also discussed the factor that "an abandonment of services across the CNJ bridge could possibly preempt employment of the Truman-Hobbs Act to solve the navigation problems caused by this bridge." *Id.* Thus, Sagner hoped that rail service over the Bridge would be maintained until action could be taken under the Truman-Hobbs Act.

Six months later, on January 27, 1976, in another meeting among the Coast Guard, the New Jersey Department of Transportation, the Port Authority and the FRA, Commissioner Sagner's Deputy, Stangl, reiterated that New Jersey was prepared "to provide alternate transportation systems for the remaining passenger rail use of the CNJ bridge and intends to accommodate the removal of the bridge." Stangl also stated that the "State

believes the Order to Alter (O/A) should be issued." Exhibit GPS-CNJ Bridge (Mar. 1984)-20. The participants recognized:

> [T]he total project cost [of removal] is some 12 million dollars. CNJ is still the legal owner of the bridge and under the law subject for their portion of the removal cost.

Moreover, they noted that action under the Truman-Hobbs Act might not be possible if an Order to Alter was not issued before the April 1, 1976 date of the start of Conrail's operations. See *id.*

In a meeting with the Coast Guard on February 13, 1976, Timpany stated that CNJ's response to an "Order to Alter" under the Truman-Hobbs Act would simply be that "we are broke". Exhibit GPS-CNJ Bridge (Mar. 1984)-21. He also indicated that CNJ considered the Bridge to be a $21 million asset and as the minutes of the meeting recite:

> At the conclusion of the meeting, it was evident that CNJ's position was that [it] wanted the bridge removed, but [it] also would be paid something for losing the bridge, which [it] considered an asset.

Id.

CNJ continued to provide passenger and limited freight service over the Bridge until April 1, 1976. At that time, pursuant to the FSP, CNJ's rail line in Elizabethport up to the beginning of the Bridge structure and CNJ's line in Bayonne within one half mile of the Bridge were taken by Conrail. The Bridge itself remained with CNJ, subject to an easement to Conrail for so long as Conrail conducted passenger operations over it, see Timpany (S) (Feb. 1984) Exh. 19; *supra* note 16. Pursuant to a subsidy arrangement with the State of New Jersey, Conrail operated passenger service over the Bridge until August 1, 1978.

On May 19, 1977, at which time the Bridge was serving passenger traffic, the Coast Guard, pursuant to the Truman-Hobbs Act,

issued an "Order to Alter" to CNJ. The Order provided in pertinent part:

> [The Coast Guard] has determined that this bridge is an unreasonable obstruction to navigation;
>
> [The Coast Guard] directs The Central Railroad of New Jersey to alter this bridge by constructing one new movable span on the same general alignment as the existing bridge. . . . If desired, the Coast Guard will consider a relocation of this facility in order to facilitate a removal of the bridge from the waterway.

Timpany (S) (Feb. 1984) Exh. 20.

Once the Coast Guard learned of the decision to discontinue rail service over the Bridge, it advised CNJ that "[a]t such time as rail service terminates, the [Bridge] will . . . not be a 'bridge' as that term is defined in the Truman-Hobbs Act. Accordingly, that Act will no longer be applicable." Instead, the Coast Guard would be forced to proceed under the Bridge Act of 1906, whereby the owner bears the entire expense of removal. The Coast Guard "reaffirm[ed] the determination made in 1972 that [the Bridge] is an unreasonable obstruction to free navigation" and informed CNJ that it has "determined that [the Bridge] should be removed when the present rail commuter service ceases." Thus, the Coast Guard notified CNJ of its "intention to issue an order for the removal of the bridge . . . under the authority of Section 4 of the Bridge Act of 1906, 33 U.S.C. 494." CNJ was given thirty days to respond to the proposed removal order. See Timpany (S) (Feb. 1984) Exh. 21.

CNJ did not respond. Instead, in July, 1978, it filed suit in the District Court for New Jersey seeking to enjoin the Coast Guard from proceeding under the Bridge Act of 1906. This was settled by an agreement dated June 11, 1979, supplemented by an agreement dated September 14, 1979. The pertinent provisions of the settlement were:

1) CNJ acknowledged that it was the owner of the Bridge within the meaning of the Bridge Act;

2) CNJ agreed that it would forego all further proceedings directed to review the Coast Guard's determination that the Bridge should be removed;

3) The suit in the District Court was to be dismissed without prejudice, and CNJ released any claim against the United States for inverse condemnation but expressly reserved its claim for severance damages;

4) The United States would remove the Bridge, using its best efforts to minimize expense, which included applying all salvage proceeds against such removal costs;

5) CNJ would recognize a claim by the United States against its estate for costs incurred in removing the Bridge, to be realized solely out of the proceeds CNJ would obtain in its valuation case, the claim to accrue interest at a compound annual interest rate of 8%.

Under CNJ's reorganization plan, which was approved by the District Court for New Jersey, *In re Central Railroad of New Jersey,* 473 F. Supp. 225 (D.N.J. 1979), CJI issued Series D 8% Contingent Notes to evidence the claim of the United States described above.

As indicated at the outset, CNJ's claim is that the failure of the FSP to provide for a taking of the Bridge, although taking the tracks adjacent on either side, inflicted severance damage in the amount of any sum which CNJ may be required to pay for removal of the Bridge.

The Supreme Court has defined severance damage as follows:

> If only a portion of a single tract is taken the owner's compensation for that taking includes any element of value arising out of the relation of the part taken to the

> entire tract. Such damages is often, though somewhat loosely, spoken of as severance damages.

United States v. *Miller*, 317 U.S. 369, 376 (1943) (footnote omitted). It had earlier stated in *Bauman* v. *Ross*, 167 U.S. 548, 574 (1897), that "[w]hen the part [of a land parcel] is left in such shape or condition, as to be in itself of less value than before, the owner is entitled to additional damages on that account."

Lower courts have offered variations on this theme. In *Miller* v. *United States, supra*, 620 F.2d at 828, the court stated:

> Severance damage, by its very nature, arises only on the taking of a portion of the owner's property and is directed at the diminution in value of the remaining portion not taken.

See *Coast Indian Community* v. *United States*, 550 F.2d 639 (Ct. Cl. 1977) (per curiam) ("Severance damage has been legally defined as the deterioration in value of the owner's remaining property caused by the transfer of property rights to a part of the land.") The court observed in *United States* v. *101.88 Acres of Land*, 616 F.2d 762, 767 (5 Cir. 1980), that "[i]n a partial taking case . . . the government impliedly agrees . . . to pay for damages to the landowner's remaining land proximately caused by the taking itself, and by the use of the land taken." See also Jahr, Law of Eminent Domain—Valuation and Proceeds § 104, at 141 (1957); 4A Nichols, *supra*, § 14.01[3], at 14-38 to 14-39; 1 Orgel, Valuation under the Law of Eminent Domain § 53, at 252 (2d ed. 1953).

CNJ's case does not fall comfortably within the concept of severance damage as thus defined. The taking of the tracks east and west of the Bridge did not prevent use of the Bridge for rail service as a tearing up of the tracks would have done; indeed Conrail maintained passenger service over the Bridge under a subsidy arrangement with New Jersey for more than two years. The Bridge had long ceased to have value for rail use. It likewise

had no value for nonrail use as that concept is normally applied, since the cost of removal considerably exceeded the scrap value.[18] CNJ's claim must be rather that the FSP decreased the likelihood of continued rail service over the Bridge and thus put removal costs under the regime of the Bridge Act for bridges not in rail service (owner pays all) rather than under the regime of the Truman-Hobbs Act for bridges in rail service (United States pays substantial portion), thereby transforming the value of the Bridge from zero to a large negative amount. However, CNJ was unable to continue operation over the Bridge without state subsidy, and any decreased likelihood of continued operation resulted not so much from the taking of the adjacent CNJ tracks as much as from the concentration in Conrail of the taken portions of CNJ and also of PC and LV, see *supra* note 16, thereby ending whatever small purpose the Bridge had served for freight traffic. It would go beyond any authority cited by CNJ[19] or known to us to hold that this came within the traditional concept of severance damage.

Although we could end our analysis at this point, the problem here presented is novel and we thus think it best to discuss the three principal arguments advanced by CNJ why it should be relieved of the bulk of the removal costs, without necessarily agreeing that any of them, if made out, would support an award for severance damage.

The first, insofar as we can understand it, is that if the Coast Guard had proceeded more speedily, the Bridge would have been altered or removed while it was still in rail service, with the Government bearing almost all the costs under the Truman-Hobbs Act. If CNJ suffered any injury from the Coast Guard's delay, the injury was not from any taking or failure to take under the Rail Act. In fact our narrative of the events shows that responsibility for delay rests rather more in CNJ than in the Coast Guard. If CNJ had reacted favorably to the Coast Guard's seemingly fair alteration Proposal of November 30, 1972, it would not have had the problem now confronting it.

Instead, whether through necessity, obstinacy, or as a bargaining tactic, CNJ refused to accept responsibility for any part of the cost and even insisted on being paid millions of dollars for abandoning a patently worthless property.

CNJ's second argument is that but for the Rail Act it would have been able to conclude an arrangement whereby the Port Authority would have acquired the Bridge for $4 million and become responsible for its removal. We find that CNJ has not established this scenario on the facts and consequently have no occasion to decide what the legal consequences would be if it had.

CNJ's factual showing rests almost wholly on testimony by R.D. Timpany who, as stated, became its Trustee in January, 1971. We summarize this as follows:

Timpany had become aware of the Port Authority's strong interest in finding a way to eliminate the Bridge, which was a hindrance to the development of Port Newark. The PC-LV Bridge was adequate to serve CNJ freight traffic to and from Jersey City and Bayonne along with that of its owners'. Removal of the Bridge "even with the expenses associated with its purchase from CNJ and the rerouting of CNJ traffic [over the PC-LV Bridge] was less expensive than alteration of the Bridge to eliminate the navigational obstruction and could be accomplished more quickly." Timpany (S) (Feb. 1984) at 3. Both the United States and the Port Authority would benefit on this account, PC and LV would obtain added revenue, the State of New Jersey could substitute less expensive bus service for the existing passenger service over the Bridge, and CNJ would save the expense of operating over the Bridge and could realize badly needed cash. Timpany began the complex negotiations needed to achieve these ends and so informed the Federal Railroad Administrator on March 6, 1971. The negotiations began well. "The concept . . . was that CNJ would sell the bridge to the Port Authority in return for a payment of $4,000,000 which was roughly the book value of the Bridge" and in addition the Coast Guard and the Port Authority were to reimburse it for the costs of

building necessary connections to the PC-LV Bridge and operating over it. Timpany (S) (Feb. 1984) at 5. Timpany had a clear recollection that a mutually satisfactory arrangement was reached in principle between CNJ, the Port Authority and the Coast Guard and that progress was also made with respect to New Jersey's substituting bus for rail passenger service. However, after a promising start, negotiations with PC for use of the PC-LV Bridge broke down.

Despite this a meeting attended by Timpany and representatives of the Port Authority and the Coast Guard was held on May 24, 1972. Timpany recalled that at the meeting he advised

> the Coast Guard and Port Authority that the book value of the CNJ Bridge was approximately $4,000,000, that CNJ expected to be compensated in such amount for the Bridge . . . . the Coast Guard indicated at the meeting that it wished to proceed as quickly as possible under the Truman-Hobbs Act to negotiate with the parties in interest to achieve removal of the CNJ Bridge.

Timpany (S) (Feb. 1984) at 7. As a result the Coast Guard wrote Timpany on June 22, 1972 that it was interested in entering into negotiation with him, PC and LV, and the Port Authority "to determine if an agreement could be reached under Section 13 of the Truman-Hobbs Act." Timpany (S) (Feb. 1984) Exh. 5. However, negotiations had been moving slowly and by July, 1972, had reached a complete impasse. Consequently, on July 18, 1972, Timpany applied to the ICC for an order directing PC and LV to Provide CNJ with operating rights over their bridge and related facilities. See Exhibit CNJ-Timpany (Dec. 1978)-22; GPs Reply In Support of Proposed Final Judgment Exh. 2 (Jan. 19, 1984). CNJ proposed to eliminate all its passenger traffic across the Bridge and to reroute its freight traffic across the PC-LV Bridge, which would have permitted "the subsequent dismantling of the CNJ bridge." *Id.* at 2. Although this proposal was opposed by PC and LV, see, *e.g.*, Timpany (S) (Feb. 1984) Exh.

7 (LV's Protest filed Aug. 23, 1972), the New Jersey Department of Transportation notified the ICC that New Jersey was "in full accord and support of [CNJ's Application] since it would eliminate a bridge which is old and in need of repairs but also an impediment to navigation in the Newark Bay area." GPs Reply In Support of Proposed Final Judgment Exh. 3 (Jan. 19, 1984) (Letter from Robert J. Bussolt, Deputy Attorney General, State of New Jersey, to Robert L. Oswald, Secretary, ICC (Sept. 19, 1972)). Timpany caused these proceedings to be halted on February 13, 1973, at the request of other carriers which were exploring proposals by New Jersey and others to achieve a merger or other consolidation of facilities among Reading, LV and CNJ.

Timpany asserted that "[u]ncertainty was introduced into these efforts when Senator Hartke's Committee began hearings in February, 1973 on the northeast rail crisis, the start of the legislative process which eventually resulted in the Rail Act." Timpany (S) (Feb. 1984) at 9. On August 17, 1973, the ICC advised Timpany that in view of the lack of progress toward an agreed solution it was considering a revival of the proceedings before it. However, essentially nothing more was achieved "in the brief period remaining before passage of the Rail Act ended all further efforts." *Id.* at 12.

This Port Authority scenario is reminiscent of the purchase by the State of New Jersey scenario which we rejected in the *Rail Use Opinion, supra*, 531 F. Supp. at 1378. We do not doubt that the Port Authority had serious discussions about playing some constructive role in the solution of the Bridge problem. We do doubt that the two Port Authority officials, now deceased, who are claimed by Timpany to have quickly acceded to his asking price of $4 million—Austin Tobin, its Executive Director, and Lyle King, its Director of Marine Terminals, in fact did so, as distinguished from listening politely to Timpany's presentation and not challenging it since doing so would have been premature until other pieces of the puzzle had been brought into place. Our experience, both before and after going on the bench, informs us

that businessmen are all too prone to make the mistake of identifying silence of public officials or other businessmen with agreement. Moreover, despite Tobin's great influence in the Port Authority, its By-Laws in effect in the early 1970's show that he had no power to commit the Authority to any such major project as this. There was simply no occasion for the Port Authority to discuss price with Timpany so long as there were no arrangements for CNJ's use of the PC-LV Bridge. What brought the 1972 discussions to an end, as Timpany in effect concedes, was the owners' refusal to negotiate for CNJ's use of the PC-LV Bridge. What might have happened but for the Rail Act as a result of the ICC's reactivating in 1973 the proceeding that Timpany had brought in July, 1972, is altogether too speculative to afford a basis for recovery by CNJ.

CNJ's third scenario is that but for the Rail Act the State of New Jersey would have acquired the Bridge along with CNJ's other properties.

CNJ's argument takes off from a statement in the *Rail Use Opinion, supra*, 531 F. Supp. at 1379:

> The GPs make no attempt to show that any particular CNJ line or facility would not have been acquired. . . . In the absence of any evidence that any particular line would not have been acquired, we hold that the GPs have not rebutted CNJ's showing that its entire system would have been purchased for rail use.

The GPs respond with a statement earlier on the same page:

> We accept CNJ's contention that, in the absence of the Rail Act, New Jersey would have bought all of CNJ's *conveyed* properties. (Emphasis supplied.)[20]

The GPs assert that by saying this the court implicity accepted testimony of Mr. Stangl, the former Deputy Commissioner of the New Jersey Department of Transportation, that New Jersey

"would not have had any interest in, and would not have bought the Newark Bay Bridge." Stangl (S) (Nov. 1979) at 32.

The two quotations are not in fact inconsistent. Our statement that the State would have bought all the conveyed properties—the only ones that we were obliged to value (apart from any question of severance damage)—is not inconsistent with a belief that in fact New Jersey would have purchased all the properties. Our statement to the latter effect, which was not essential to the *Rail Use* decision, was in general reasonable enough. The discussions between CNJ's Trustee and the State had proceeded on the basis of the latter's purchase of all of CNJ's properties. There had been no segregation studies, and, again speaking in general, it would have been no great hardship for the State to purchase all rather than some since the purchase would have been made at a price at which the properties could be liquidated if found to be unnecessary for rail service. Since no issue concerning the Bridge was before us, there was no need for us to give specific consideration to Stangl's testimony, and we did not.

Now that the issue is before us, we see no reason for not crediting his testimony. As our statement of the facts shows, the State was thoroughly acquainted with the problems of the Bridge; it knew full well that if it bought the Bridge it would be saddled with all removal costs unless arrangements with the Coast Guard under the Truman-Hobbs Act could be concluded while the Bridge was still in rail service. Although no final decision had been made, it had long been clear that needed passenger service could be furnished by bus. CNJ argues that the State would have needed the Bridge in order to compete with other carriers for freight to and from the Bayonne peninsula and Jersey City. However, the State's interest was that the traffic be served, not in the carrier who should serve it. See Peabody Study, Analysis of CNJ Freight Traffic by Line Segment, Sept 19, 1974, at 80, 1 CNJ Nonrail Use App. at 310 ("There is no traffic generated by [the Bridge] and it is not needed as a connection."). There is thus no sufficient reason to disbelieve Stangl's testimony that the

State, whose main interest in the Bridge was in its removal as a hazard to navigation in Newark Bay, would not have purchased it at the risk of incurring a heavy liability by doing so.

Although this factual finding that the State would not have purchased the Bridge disposes of CNJ's third scenario, there are other defects in CNJ's argument.

Even if the State had included the Bridge in the properties to be purchased from CNJ, it does not follow that it would have paid a price that did not reflect what CNJ would be obliged to pay for removal of the Bridge if it ceased rail operation over it. In our *CNJ Opinion, supra*, 571 F. Supp. at 1279, we characterized our *CMV* and *Rail Use Opinions* as having broadly concluded that non-rail use value for the condemned properties "was the value that could be obtained by sale for the next most valuable use, namely, a break-up of the railroad and a sale of its component parts." This principle envisions a process in which the State, as a knowledgeable buyer, would have computed what CNJ could have realized from scrapping the condemned properties, including such costs as the sealing of tunnels, the levelling of embankments and the removal of bridges, and paid only the proverbial dollar more, see, *e.g., New Haven Inclusion Cases*, 399 U.S. 392, 437 (1970); *CNJ Opinion, supra*, 571 F. Supp. at 1286. It was on this basis that we computed CNJ's non-rail use value in the *CNJ Opinion*. We see no reason to depart from this principle. If the State had purchased the Bridge along with the condemned properties, it would have insisted that full account be taken of the benefit it was thereby conferring by relieving CNJ of the burden of removing the Bridge at its own expense—a burden which CNJ would otherwise have been unable to unload. CNJ would have had no effective response to the State's demand for such a reduction in price. The only other way CNJ would have had to bring itself under the Truman-Hobbs Act, namely, by continuing the Bridge in rail service on its own account, was not open to it since it lacked the means to do this on a continuing basis unless heavily subsidized by the State.

CNJ argues against this that the State would nott have taken such a harsh position, particularly since it wouldl have been restrained by fear that if Timpany refused to selll at a price reduced by the anticipated cost of removing the Bridgge, as he says he would have, the State would have been obliged to resort to condemnation and the New Jersey courts might follow the decision of the New York Court of Appeals, purporting iin part to be applying New Jersey law, in *In re Port Authority Trans-Hudson Corp. (PATH)*, 20 N.Y.2d 457, 285 N.Y.S.2d 24 (1967), *cert. denied*, 390 U.S. 1002 (1968), discussed in our *CMV Opinion, supra*, 445 F. Supp. at 1027-29, and again in our *Rail Use Opinion, supra*, 531 F. Supp. at 1325-26. CNJ says, in effect, that the State would not have administered such tough medicine as to say that the non-rail use value of its properties (which we have found to be $42,509,299 for the condemned properties) should be reduced in practical effect by as much as $14,000,000 less the value of any scrap obtained from the Bridge. However, this looks at only one aspect of the problem. If the State of New Jersey had purchased CNJ's properties with a view to continued operation over the Bridge, it would have been taking on an enormous burden in maintaining a heavily losing service for the indefinite future.[21] We thus would see nothing immoral in its insisting that the purchase price of the assets should be reduced to reflect a cost, even a very large one, that CNJ would have experienced on a scrap sale of its properties as a result of the Bridge Act, although the State would not incur it under the Truman-Hobbs Act if it continued a losing rail service over the Bridge. Putting the matter in a slightly different way, the Bridge was a $14 million albatross. CNJ could get rid of the bird only by (1) continuing operations over the Bridge, (2) moving them to the PC-LV Bridge and persuading the Coast Guard to treat this as a relocation so that the Truman-Hobbs Act would still apply, or (3) getting the State to continue them. The first possibility was excluded by CNJ's having become dependent on a state subsidy. The second had been blocked, at least for the time being, by the

intransigence of PC and LV. This left only the third. If the State was to continue the operations at heavy cost, it was entitled to ask that its service to CNJ be recognized by a reduction in the purchase price equivalent to what CNJ would have had to bear on a scrap sale. The albatross, after all, was CNJ's, not the State's. With respect to *PATH,* we add to our previous discussion only that the Hudson tunnels there at issue were a vital public service, "admittedly of great usefulness in the daily transportation of thousands of commuters", 20 N.Y.2d at 468, 285 N.Y.S.2d at 30, whereas the Bridge was of marginal usefulness—as witness the abandonment of already limited freight service in 1976 and of passenger service in 1978. There is thus serious doubt whether the rationale of *PATH* extends to the Bridge. Beyond that we adhere to the statement in our *Rail Use Opinion, supra,* 531 F. Supp. at 1326, which we quote for convenience in the margin.[22] Furthermore, if the State was seriously concerned that the New Jersey courts would follow *PATH* if it condemned the Bridge, New Jersey had the simple option of not condemning it. To be sure, this would have invited a claim for severance damage but, for reasons stated at the outset, we have the gravest doubt whether a failure to take which does not damage the untaken property except by lessening the chances of payment by the United States for its removal comes within that concept. Beyond this we have never found that if negotiations for the sale of CNJ's properties had collapsed, New Jersey would have condemned them; what the State would have done in that uncontemplated eventuality is completely uncertain.

In the *New Haven Inclusion Cases, supra,* 399 U.S. at 482, the Supreme Court said, although in a slightly different context, that a hopelessly losing railroad cannot be treated "as a liquidating enterprise with respect to certain items and as an operating railroad with respect to others, depending on which happens to yield the higher value." This seems to us a fairly appropriate characterization of CNJ's position with respect to the Bridge. It does not dispute that all its conveyed properties must be valued "as a

liquidating enterprise". It seeks, however, to have the unconveyed Bridge valued "as an operating railroad" facility—operating at least long enough so that the Coast Guard would have been obliged to pay a substantial portion of the cost of its alteration or removal. We can understand CNJ's assiduity in asserting this, since the amount at stake is indeed large in relation to the NLV of the conveyed properties. But the Bridge problem has been with CNJ for years and we see no sufficient basis, as a matter of fairness, let alone as a matter of constitutional requirement, for shifting to the United States the cost of removing a hindrance to navigation which was on the brink of becoming useless for rail service when the discussions leading to enactment of the Rail Act began.

We accordingly propose to sign the final judgment attached to the GPs' memorandum of April 19, 1984. We shall defer doing this until the disposition of any petition for reconsideration which CNJ may desire to file. Any such petition must be filed within twenty days from the filing of this opinion.

HENRY J. FRIENDLY

Henry J. Friendly, *Presiding Judge*

JOHN MINOR WISDOM

John Minor Wisdom, *Judge*

ROSZEL C. THOMSEN

Roszel C. Thomsen, *Judge*

Appendix N

FOOTNOTES

1. Although we agree that these provisions give us jurisdiction in the basic sense of power to pass upon CNJ's claims, we have remained troubled over the question of what remedy we could prescribe if we were to sustain them. Section 303(c)(2) states:

> If the special court finds that the terms of one or more exchanges for certificates of value and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated or controlled by a railroad in reorganization (taking into consideration compensable unconstitutional erosion, if any, which the special court finds to have occurred in the estate of each such railroad, during the bankruptcy proceeding with respect to such railroad), which has transferred rail properties pursuant to the final system plan, it may—
>
> (A) enter a judgment reallocating the certificates of value in a fair and equitable manner if they have not been fairly allocated among the railroads transferring rail properties to the Corporation or any subsidiary thereof, except that one certificate of value shall be allocated to each such railroad; and
>
> (B) if the lack of fairness and equity cannot be completely cured by a reallocation of the certificates of value, order the Corporation to provide for the transfer to the railroad of certificates of value issued by the Association as designated in the final system plan in such nature and amounts as would make the exchanges fair and equitable; and
>
> (C) enter a judgment against the Corporation if the judgment would not endanger the viability or solvency of the Corporation.

Subparagraph (A), even if intelligible, would no longer be available since CNJ is the only transferor remaining. We have never been able to understand subparagraph (B), see *180 Day Appeals*, 384 F. Supp. 895, 929 & n.64 (1974). This leaves subparagraph (C). Although it now seems likely that any judgment of the magnitude sought by CNJ "would not endanger the viability or solvency" of Conrail, we have characterized this as "a rather curious" remedy, *180 Day Appeals, supra*, 384 F. Supp. at 929, and Conrail strongly objects to our invoking it. Another possibility would be for us to declare that CNJ was constitutionally

entitled to a certain amount in addition to NLV, and to leave that declaration to be enforced by a suit under the Tucker Act in the Claims Court, 28 U.S.C. § 1491; this too has its difficulties. In the light of our disposition on the merits, it becomes unnecessary to deal with the question of remedy.

2. We went on to say that we proposed to instruct the special masters who were then contemplated

> that in valuing the properties they need not address themselves to the fair and equitable standard as distinguished from the constitutional minimum in the absence of a specific and supported claim that a different result would ensue from application of such a standard, in which event the master shall seek this Court's further instructions.

425 F. Supp. at 270.

3. In fact, the 86 figure is a yield to maturity, reflecting the upward pull of the certainty of the payment of the bond at face value on the maturity date.

4. It is not altogether clear whether the statement in *Blankinship* "that the 6 percent figure employed by Congress in the Declaration of Taking Act cannot be viewed as a ceiling on the rate of interest allowable in computing just compensation with respect to a deficiency", 543 F.2d at 1276, rested on an interpretation of 40 U.S.C. § 258a (including the canon of interpreting so as to avoid constitutional doubts, see, *e.g.*, *United States* v. *Rumely*, 345 U.S. 41, 45 (1953) (Frankfurter, J.)), or on a holding that the specification of a 6% interest rate had become unconstitutional. The Court of Claims seems to have taken the former view, *Miller* v. *United States*, 620 F.2d 812, 837 (Ct. Cl. 1980), discussed *infra;* see also *United States* v. *329.73 Acres*, 704 F.2d 800, 812 (5 Cir. 1983) (en banc); we would be inclined to take the latter. So, as we read its opinion, does the Supreme Court, see *Kirby Forest Indus.* v. *United States*, 52 U.S.L.W. 4607, 4610 n.16 (May 21, 1984). The same footnote tells us that the Government in its brief to the Court indicated that it has acquiesced in the decisions that the 6% rate provided in the Declaration of Taking Act is not a ceiling.

5. CNJ's proposed rates are:

Apr. 1, 1976—Mar. 31, 1977	8.33%
Apr. 1, 1977—Mar. 31, 1978	8.20%
Apr. 1, 1978—Mar. 31, 1979	8.96%
Apr. 1, 1979—Mar. 31, 1980	10.21%
Apr. 1, 1980—Mar. 31, 1981	12.50%
Apr. 1, 1981—Mar. 31, 1982	14.08%
Apr. 1, 1982—Mar. 31, 1983	13.08%
Apr. 1, 1983—Dec. 31, 1983	8.64%

For subsequent years, CNJ invites the court to refer to Moody's Composite Index on Yields on Long Term Corporate Bonds rate Aaa, which is the source of its proposed rates. See CNJ Answer and Memorandum at 23 (Jan. 5, 1984).

6. This seems to be the point made by Judge Skelton in his dissent in *Tektronix, Inc.* v. *United States*, 552 F.2d 343, 356 (Ct. Cl. 1977) (en banc), *cert. denied*, 439 U.S. 1048 (1978).

While CNJ brings to our attention that "following emergence from the CNJ reorganization proceedings in 1979 it placed its cash assets in short term instruments, principally bank CDs, with resulting average yearly yields ranging from 13.3% to 16.3% during the years 1979 to 1982", it recognizes that "[t]he courts, however, have not looked with favor upon determining the appropriate rate of interest on the basis of the individual claimant's circumstances or experience." CNJ Answer and Memorandum at 20-21 (Jan. 5, 1984). Beyond this, bank CDs are not risk-free.

7. Any computation on the basis of yields available on short-term Government obligations would have to take into account the transaction costs on frequent roll-overs. These could not be avoided by purchasing shares in a money market fund holding only short-term government securities; the fund itself would have the transaction costs and would charge a management fee as well.

8. Although the legislative history does not inform us why December 31, 1987 was chosen as the maturity of the CVs, it is fair to assume that Congress thought it would take that long to fix just compensation. The thought was not unreasonable. If it had proved necessary to make a final determination as to all of the 23 railroads, including the giant Penn Central and its lessors, rather that as to only one, we would have been hard-pressed to complete the job by the end of 1987 even with the

expedited procedures we have developed. In the settlements we have approved, USRA has not exercised its right to defer payment until December 31, 1987; we have no reason to doubt its willingness to follow the same course here once the amount payable to CNJ is determined.

9. To the extent that there was any such anticipation, it would, of course, have been reflected in the yields prevailing on April 1, 1976. In fact, as shown by CNJ's figures on long-term corporate bond yields, see *supra* note 5, yields in the period April 1, 1977 - March 31, 1978, declined from those in the previous year.

10. The condemnee's proof in *Eveandra* was quite similar to that of CNJ's in the instant case. The condemnee asserted that the "prevailing and proper" interest rate for the period 1972-77 was 9.75%. This position was supported by expert testimony: (1) a New York bank vice-president testified as to the prevailing prime rates of interest and the practices of banks in the New York metropolitan area; (2) a Columbia University finance professor, after studying prevailing interest rates on borrowing and rates of return on investments during the period, testified that "the applicable rate is midpoint between average borrowing cost during [1972-1977] of 12 per cent per annum, and [New York] county's return on short term investments of 7.5 per cent per annum, which midpoint is 9.75 per cent per annum." Juris. Statement for Appellant, *County of Nassau* v. *Eveandra Enterprises, Inc.*, No. 77-210, at 6. Thus, the condemnee asserted that "[t]his proof established the just compensation that [he] was entitled to by the Fifth Amendment made applicable to the Fourteenth Amendment," *id.* at 2, and stated that the Court's jurisdiction was based on 28 U.S.C. § 1257(2).

The New York Court of Appeals in *In re City of New York*, 58 N.Y.2d 532, 462 N.Y.S.2d 619 (1983) (per curiam), has recently characterized *Eveandra* as standing only for the proposition that the statutory 6% rate for the years 1972-1977 was not so "unreasonably low" as to deprive condemnees of just compensation given the fact that interest rates fluctuated around 6% during the period, *id.* at 538, 462 N.Y.S.2d at 627, and approved the action of a trial court which, after reviewing economic reports showing that interest rates on medium term public securities "consistently rose far above 6% during the period 1978-1981," applied a median interest rate of 9% for that period in order to avoid using the statutory rate that had become so "unreasonably low", *id.* at 536, 402 N.Y.S.2d at 620, saying that "the statutory rate is entitled to a presumption of reasonableness, not a presumption of constitutionality", *id.* at

538 n.2, 462 N.Y.S.2d at 662 n.2. This may decrease but does not altogether remove the force of the Supreme Court's action in *Eveandra*.

11. What we have said here is not in direct conflict with *Blankinship, supra*, 543 F.2d at 1276, or *Miller, supra*, 620 F.2d at 837. *Blankinship* dealt with a 6% rate of interest provided in the Declaration of Taking Act, enacted in 1931, 46 Stat. 1421; this scarcely represented a considered judgment by Congress as to what would constitute a fair rate for a taking in 1973. The *Miller* court, applying the principle of construing so as to avoid serious constitutional doubt, see, *e.g., United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971), construed Pub. L. No. 90-545 as setting 6% interest as a floor rather than a ceiling, thereby leaving the courts free to require higher rates without having to declare the statute unconstitutional. We find it impossible to construe § 306(c)(4)(D) of the Rail Act to mean anything other than what it carefully and clearly says.

12. We there said, 439 F. Supp. at 1380:

> CNJ was atypical in several respects. It carried a burden of commuter passenger traffic in the northern New Jersey metropolitan area which was huge in comparison with its total operations; its freight services were almost entirely those of a terminating or originating carrier; and we are told that its divisions with longer-haul carriers moving the traffic from and to the west were unfavorable—particularly the divisions in the Wilkes-Barre—Scranton, Pa., area.

See, to the same effect, *Rail Use Opinion* 531 F. Supp. 1191, 1380 (1981):

> [CNJ] had not reported an annual profit since 1957; by 1973, it showed a negative net worth. It was in arrears on interline balances and on scheduled wage increases for its employees. It had already begun disposing of some of its facilities and operations; in 1971-72, it halted its New Jersey harbor lightering operations, its Jersey City coal dumping activities, its entire Pennsylvania freight operation, and its service on several small branch lines.

13. Although we have done our best to reconstruct the result that such bargaining would have produced, we have the gravest doubt that if Congress had not intervened with the Rail Act, CNJ, in the resulting

chaos, could have realized $42,509,299 for the conveyed properties. For one thing, our estimate was predicated on the hypothesis that, although discontinuance of CNJ service was assumed, service by other carriers would continue, thus enhancing the value of CNJ's land and facilitating disposition of other assets. This would have been impossible but for the Rail Act.

14. We see no force in CNJ's argument that use of an 8% compound interest rate with respect to the CVs is unconstitutional because CNJ stipulated that the estimated proceeds of sale should be discounted back to April 1, 1976, at the rate of 15.22%, see 571 F. Supp. at 1294 n.34. The 8% rate was reasonable when viewed *ex ante*. While we do not know how the 15.22% stipulated rate was arrived at, presumably it viewed the situation *ex post*. We likewise have given no weight to the GPs' argument that the 8% rate is validated by the fact that, under CNJ's reorganization plan, notes paid from proceeds of this case bear interest at 8%.

15. The Bridge replaced an older wooden structure constructed pursuant to an act of the New Jersey legislature, see 1860 N.J. Laws ch. 64.

16. The FSP has this to say with respect to the Bridge, Vol. II, p. 215:

> Information for Line-Transfer Decision
>
> Bayonne shippers will continue to be served by ConRail via the existing Lehigh Valley bridge which is located 3 miles to the north of the CNJ bridge. Subsequent dismantling of the CNJ bridge will remove a serious navigational hazard for ocean shipping moving between Newark Bay and New York Harbor. Elimination of the bridge will, however, sever a lightly patronized suburban passenger service. (The State of New Jersey has expressed some interest in rerouting this service.)
>
> Disposition
>
> The Newark Bay Bridge is *not* designated for transfer to Consolidated Rail Corp.
>
> *Continuation of passenger services using this bridge is dependent on the purchase, lease or other transfer of the necessary facilities to a public body.* (Emphasis in original.)

Appendix N

The deeds executed by the CNJ Trustee conveying to Conrail CNJ's rail property in Hudson and Union counties provided respectively:

> The part of the line of railroad [excepted] begins at the lateral cut line in Bayonne and extends to the [Hudson] County line at the Newark Bay Bridge.
>
> The part of the line of railroad [excepted] begins at the lateral cut line in Elizabethport and extends to the [Union] County line in Newark Bay.

CNJ-CRC-RP-7, at B-11; CNJ-CRC-RP-15, at B-2. CNJ's retention of the Bridge was subject to the following easement for commuter service, granted to Conrail, which was part of both deeds:

> Subject to the easement and right to use . . . the existing bridge or bridges, track or tracks, and track or tracks on such bridges, located on and across the [Newark Bay Bridge] for so long as passenger train service is operated to the City of Bayonne.

CNJ-CRC-RP-7, at B-11; CNJ-CRC-RP-15, at B-2.

17. In *Union Bridge Co.*, the Court held that the duty of a bridge owner to make alterations to eliminate an unreasonable obstruction to navigation and to bear all the cost, pursuant to the Secretary of War's order under § 18 of the Rivers and Harbors Act of 1899, ch. 425, 30 Stat. 1121, 1153, was not a taking within the Fifth Amendment.

18. This was conceded in various studies referred to in our *CNJ Opinion*, *e.g.*, the Wyer Dick Study, Exhibit CNJ-Timpany (Dec. 1978)-19, at 39-40; the DeLeuw Cather Study, Exhibit CNJ-Jacoby (Dec. 1978)-57, at 30; the Peabody Study, Exhibit CNJ-Jacoby (Dec. 1978)-62, at 48-49.

19. CNJ relies particularly on *State* v. *William C. Rohrer, Inc.*, 145 N.J. Super. 63, 366 A.2d 1017 (1976), *aff'd per curiam*, 161 N.J. Super. 561, 392 A.2d 162 (App. Div. 1978), *vacated and remanded*, 80 N.J. 462, 404 A.2d 29 (1979). This is a classical case of severance damage. The State took part of a building in order to widen a highway; the cost of reconstructing the remainder of the building exceeded its value. Such novelty as there is in the case is the holding of the Supreme Court of New Jersey with respect to the remedy, namely, allowing the condemnee the option of treating the condemnation as of the whole building. *Id.* at 468, 404 A.2d at 32. While pursuing this analogy

would enable CNJ to thrust on Conrail ownership of the Bridge and consequent liability for removal costs, we find nothing in the just compensation clause authorizing us to require the Government to take property it does not want, as distinguished from requiring it to pay damages for injury which its taking has inflicted on property not taken. The Rail Act clearly puts decision as to what property is to be taken in USRA, not in this court.

20. We quoted the phrase in the *CNJ Opinion,* 571 F. Supp. 1269, 1279 (1983).

21. We say this since the State could not have become party to an arrangement whereby the United States paid the bulk of the alteration costs under the Truman-Hobbs Act unless it had a *bona fide* intention of continuing operations. The State would have had no more assurance than CNJ that it would have been possible to work out a multi-party agreement whereby operations would have been routed over the PC-LV Bridge, with the United States paying most of the costs of relocation and removal.

22. While technically the New York Court of Appeals in *PATH* applied New Jersey law to the condemned property in New Jersey, all the court had to say on that score was that New Jersey law was similar to the general rule followed in New York and in the federal jurisdiction and that the case before it was *sui generis,* rendering it impossible to make with certainty any statements predicting the reaction of the New Jersey Supreme Court. No New Jersey cases following *PATH* have been cited to us and we are not aware of any. Thus, there is no good reason to take the going concern value portion of the *PATH* opinion as indicative of what New Jersey courts would decide New Jersey's own law to be in the condemnation of the Ts' passenger lines. And there can be little doubt that public officials would not have paid such premiums by way of settlement for fear that a New Jersey court would follow the going concern value holding of *PATH*. . . . We thus need not rule on the GPs' argument that for this court to recognize a premium based on a state court's decisional law that is in conflict with federal condemnation law would violate principles of federal supremacy.

APPENDIX O

CA-863

Appendix O

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 23, 1984, James F. Davey, Clerk

Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

FINAL JUDGMENT UPON CLAIMS OF CENTRAL RAILROAD COMPANY OF NEW JERSEY UNDER SECTIONS 303(c) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

On April 1, 1976, rail properties were conveyed to Consolidated Rail Corporation and other transferees by, *inter alia*, the Trustee of the Central Railroad Company of New Jersey and six affiliated transferors, Communipaw Central Land Co., Dover & Rockaway Railroad Co., Mt. Hope Mineral Railroad Co., Wharton & Northern Railroad Co., Bay Shore Connecting Railroad, and Central Railroad Co. of Pennsylvania (hereinafter "CNJ and its affiliates"), pursuant to Section 303(b) fo the Regional Rail Reorganization Act of 1973, as amended ("Rail Act").

Section 303(c) of the Rail Act requires this Court to determine whether the conveyances of rail properties by CNJ and its affiliates, in exchange for certificates of value issued by United States Railway Association ("USRA") pursuant to Section 306(b) of the Rail Act, are in the public interest and fair and equitable to each transferor or are more fair and equitable than is required as a constitutional minimum; and whether any of the proceeds received for the conveyance of such rail properties reflects value attributable to the maintenance or improvement of property pursuant to an agreement under Sections 213, 215(a)(1) or

215(a)(2) of the Rail Act. Section 306(c)(4) fo the Rail Act requires this Court to determine the base value of each certificate of value issued to a transferor by (A) taking the net liquidation value of the properties conveyed by that transferor; (B) subtracting the value of other benefits provided under the Rail Act; (C) adding any amounts required for compensable unconstitutional erosion; (D) adding interest from April 1, 1976 to the date of redemption of the certificates of value at a rate of 8% per annum compounded annually; and (E) dividing the resulting value by the number of certificates of value issued to that transferor.

This Court has previously held that net liquidation value, within the meaning of Section 306(c)(4)(A) of the Rail Act, satisfies the requirements of constitutional minimum value, within the meaning of the Fifth Amendment to the U.S. Constitution and Section 303(c) of the Rail Act.

On December 5, 1983, this Court entered its Order Making Certain Findings and Determination Pursuant to Section 306(c)(4) of the Regional Rail Reorganization Act of 1973, in which it found that:

> 1. The total net liquidation value, within the meaning of Section 306(c)(4)(A) of the Rail Act, of the rail properties conveyed by CNJ and its affiliates pursuant to Section 303(b) of the Rail Act, is $42,509,299 as of April 1, 1976.
>
> 2. The value of other benefits ("VOB") within the meaning of Section 306(c)(4)(B) of the Rail Act, provided to CNJ and its affiliates, and each of them, is zero.
>
> 3. The compensable unconstitutional erosion ("CUE"), within the meaning of Section 303(c)(1)(A)(i) and Section 306(c)(4)(C) of the Rail Act, suffered by CNJ and its affiliates, and each of them, is zero.

Appendix O

On December 19, 1983, Central Jersey Industries, Inc. ("CJI"), the corporate successor to CNJ following reorganization, submitted to the Court and all interested persons a proposed allocation among CNJ and its affiliates of the total net liquidation value set forth above. All objections to that proposed allocation have been duly considered by the Court.

In our CMV Opinion, 445 F. Supp. 994, 1041 (1977), this Court indicated that the "principle of severance damage" appeared to be applicable in these proceedings. CJI has raised claims of severance damage with respect to its former railroad bridge over lower Newark Bay. In addition, CJI has claimed that the compounded annual 8% interest rate with respect to the certificates of value, as provided in Section 306(c)(4) of the Rail Act, is constitutionally inadequate. In accordance with our December 5, 1983 Memorandum Accompanying Judgment under Section 306(c)(4) of the Rail Act and our January 25, 1984 Order With Respect to Further Proceedings Under Section 303(c) of the Rail Act, the parties have submitted additional evidence and memoranda upon these two claims of CJI, and the Court heard oral argument on May 16, 1984.

The parties have separately indicated their concurrence that any judgment in favor of CJI and the CNJ affiliates for the sale, lease or transfer of rail properties, based upon net liquidation value of those properties, plus interest, will not include any amount reflecting value attributable to the maintenance or improvement of property pursuant to an agreement under Sections 213, 215(a)(1) or 215(a)(2) of the Rail Act.

Having considered the proposed form of judgment submitted by the Government Parties, the objections of CJI thereto and the Government Parties' reply, the further evidentiary materials filed by the parties, their written and oral arguments, and all prior submissions and proceedings in this case;

The Court hereby finds and determines as follows:

Appendix O

1. The net liquidation value, within the meaning of Section 306(c)(4)(A) of the Rail Act, as of April 1, 1976, of the rail properties conveyed by CNJ and its affiliates pursuant to Section 303(b) of the Rail Act is as set forth in Table 1 hereto.

2. The value of other benefits, within the meaning of Section 306(c)(4)(B) of the Rail Act, provided to CNJ and its affiliates is zero as set forth in Table 1 hereto.

3. The compensable unconstitutional erosion, within the meaning of Section 303(c)(1)(A)(i) and Section 306(c)(4)(C) of the Rail Act, suffered by CNJ and its affiliates is zero as set forth in Table 1 hereto.

4. The base value of the Certificates of Value within the meaning of Section 306(c)(4) to be delivered to CJI on behalf of CNJ and its affiiiates shall be as set forth in Table 1 hereto, as of December 31, 1987. In the event any Certificate of Value is redeemed prior to such date, the base value shall be recalculated to reflect interest at the rate provided in Section 306(c)(4) from April 1, 1976 to and including the date of redemption, and not thereafter.

5. The transfers and conveyances of rail properties by CNJ and its affiliates in exchange for the Certificates of Value set forth in Table 1 hereto having the principal amount set forth in Table 1 and the other benefits accruing to CNJ and its affiliates as a result of such exchange are in the public interest and are fair and equitable to CNJ and its affiliates in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77 of Bankruptcy Act (11 U.S.C. § 205), as it was in effect at the time of the commencement of these proceedings, and with the standard of fairness and equity applicable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization,

and are not more fair and equitable than is required as a constitutional minimum

6. No portion of any proceeds received by CNJ and its affiliates for the sale, lease or transfer of property reflects value attributable to the maintenance or improvement of property pursuant to an agreement under Sections 213, 215(a)(1), or 215(a)(2) of the Rail Act.

7. The Court has jurisdiction under the Rail Act to decide whether CNJ suffered severance damages as a result of the decision to permit CNJ's Newark Bay Bridge to be retained by the estate, and the Court finds that CNJ has not suffered any compensable severance damages resulting from the decision to permit the estate to retain such property.

8. The Court has jurisdiction under the Rail Act to decide the constitutional adequacy of the statutory rate of interest provided under Section 306(c)(4) of the Rail Act, and the Court finds that the interest rate provided therein is constitutionally sufficient.

In view of the findings and determinations made herein, it is hereby, ORDERED AND ADJUDGED that within ten (10) days following the effective date of this Order:

1. United States Railway Association shall deliver to the Clerk of the Court, and the Clerk shall deliver to CJI on behalf of CNJ and its affiliates, instruments evidencing the number of Certificates of Value set forth opposite the name of CNJ and each of its affiliates set forth in Table 1 hereto, each such series of Certificates of Value to have the aggregate principal amount set forth in Table 1 hereto for said series.

2. The Clerk shall endorse upon the consolidated instrument evidencing Certificates of Value deposited with

the Clerk pursuant to Section 306(a) of the Rail Act a notation that Certificates of Value in the numbers and amounts listed in Table 1 hereto have been distributed pursuant to this Order and that the number of Certificates of Value evidenced by that consolidated instrument is accordingly reduced.

This Order and the findings and determinations made in it shall be effective from and after the date of its entry.

HENRY J. FRIENDLY

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

Roszel C. Thomsen
Judge

DATED: July 23, 1984

FILED
JUL 23 1984
JAMES F. DAVEY, Clerk

TABLE 1

Transferor	*NLV*	*VOB*	*CUE*	*Principal Amount of CV's*	*Statutory Interest on CV's at 12-31-87*	*Aggregate Base Value of CV's at 12-31-87*	*Number of Certificates in Series*	*Base Value of each CV at 12-31-87*
The Central Railroad of New Jersey	$40,874,734	0	0	$40,874,734	$60,159,106	$101,033,840	443,654	$ 227.73
Communipaw Central Land Company	227,785	0	0	227,785	335,252	563,037	106	5,311.67
Dover and Rockaway Railroad Company	76,933	0	0	76,933	113,229	190,162	1,012	187.91
Mt. Hope Mineral Railroad Company	106,555	0	0	106,555	156,827	263,382	570	462.07
Wharton & Northern Railroad Company	119,597	0	0	119,597	176,022	295,619	1,280	230.95
Bay Shore Connecting Railroad	240,661	0	0	240,661	354,203	594,864	512	1,161.84
Central Railroad Co. of Pennsylvania	863,034	0	0	863,034	1,270,207	2,133,241	15,475	137.85

APPENDIX P

Appendix P

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 30, 1984, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(c) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Central Jersey Industries, Inc. hereby appeals to the Supreme Court of the United States from the final judgment of the Special Court Regional Rail Reorganization Act of 1973, entered on July 23, 1984.

This appeal is taken pursuant to 45 U.S.C. 743(d) and 28 U.S.C. § 1253.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant
Central Jersey Industries, Inc.

By: STANLEY WEISS
.....
STANLEY WEISS
DEAN R. MAY

Dated: July 25, 1984

Appendix P

CERTIFICATE OF SERVICE

I, Stanley Weiss, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on this day I caused a copy of this Notice of Appeal to the Supreme Court of the United States to be (i) served upon the following pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, by mailing said document, properly addressed, by first class mail to:

Solicitor General
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

United States Railway Association
95 L'Enfant Plaza North, S.W.
Washington, D.C. 20595

United States Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

United States Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590

Consolidated Rail Corporation
c/o Laurence Z. Shiekman, Esq.
Pepper, Hamilton & Schetz
123 South Broad Street
Philadelphia, Pennsylvania 19109;

and (ii) served in accordance with Rules 9 and 11 of the Special Court.

All parties required to be served have been served.

STANLEY WEISS

.....
Stanley Weiss

Dated: July 25, 1984

Appendix P

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 30, 1984, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bay Shore Connecting Railroad hereby appeals to the Supreme Court of the United States from the final judgment of the Special Court Regional Rail Reorganization Act of 1973, entered on July 23, 1984.

This appeal is taken pursuant to 45 U.S.C. 743(d) and 28 U.S.C. § 1253.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant
Bay Shore Connecting Railroad

By: STANLEY WEISS
.....
STANLEY WEISS
DEAN R. MAY

Dated: July 25, 1984

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400 7th Street, S.W.
Washington, D.C. 20590
Consolidated Rail Corporation
c/o Laurence Z. Shiekman, Esq.
Pepper, Hamilton & Schetz
123 South Broad Street
Philadelphia, Pennsylvania 19109;

and (ii) served in accordance with Rules 9 and 11 of the Special Court.

All parties required to be served have been served.

STANLEY WEISS

.....
Stanley Weiss

Dated: July 25, 1984

Appendix P

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 30, 1984, James F. Davey, Clerk

SPECIAL COURT—MISC. NO. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Central Railroad of Pennsylvania hereby appeals to the Supreme Court of the United States from the final judgment of the Special Court Regional Rail Reorganization Act of 1973, entered on July 23, 1984.

This appeal is taken pursuant to 45 U.S.C. 743(d) and 28 U.S.C. § 1253.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant
The Central Railroad of Pennsylvania

By: STANLEY WEISS .....
STANLEY WEISS
DEAN R. MAY

Dated: July 25, 1984

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Washington, D.C. 20530
United States Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590
Consolidated Rail Corporation
c/o Laurence Z. Shiekman, Esq.
Pepper, Hamilton & Schetz
123 South Broad Street
Philadelphia, Pennsylvania 19109;

and (ii) served in accordance with Rules 9 and 11 of the Special Court.

All parties required to be served have been served.

STANLEY WEISS

.....
Stanley Weiss

Dated: July 25, 1984

Appendix P

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 30, 1984, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Communipaw Central Land Company hereby appeals to the Supreme Court of the United States from the final judgment of the Special Court Regional Rail Reorganization Act of 1973, entered on July 23, 1984.

This appeal is taken pursuant to 45 U.S.C. 743(d) and 28 U.S.C. § 1253.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant
Communipaw Central Land Company

By: STANLEY WEISS
.....
STANLEY WEISS
DEAN R. MAY

Dated: July 25, 1984

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Washington, D.C. 20590
Consolidated Rail Corporation
c/o Laurence Z. Shiekman, Esq.
Pepper, Hamilton & Schetz
123 South Broad Street
Philadelphia, Pennsylvania 19109;

and (ii) served in accordance with Rules 9 and 11 of the Special Court.

All parties required to be served have been served.

STANLEY WEISS

.....
Stanley Weiss

Dated: July 25, 1984

Appendix P

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 30, 1984, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Dover and Rockaway Railroad Company hereby appeals to the Supreme Court of the United States from the final judgment of the Special Court Regional Rail Reorganization Act of 1973, entered on July 23, 1984.

This appeal is taken pursuant to 45 U.S.C. 743(d) and 28 U.S.C. § 1253.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant
Dover and Rockaway Railroad Company

By: STANLEY WEISS
.....
STANLEY WEISS
DEAN R. MAY

Dated: July 25, 1984

Appendix P

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Washington, D.C. 20530
United States Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590
Consolidated Rail Corporation
c/o Laurence Z. Shiekman, Esq.
Pepper, Hamilton & Schetz
123 South Broad Street
Philadelphia, Pennsylvania 19109;

and (ii) served in accordance with Rules 9 and 11 of the Special Court.

All parties required to be served have been served.

STANLEY WEISS

.....
Stanley Weiss

Dated: July 25, 1984

Appendix P

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 30, 1984, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(c) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mt. Hope Mineral Railroad Company hereby appeals to the Supreme Court of the United States from the final judgment of the Special Court Regional Rail Reorganization Act of 1973, entered on July 23, 1984.

This appeal is taken pursuant to 45 U.S.C. 743(d) and 28 U.S.C. § 1253.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant
Mt. Hope Mineral Railroad Company

By: STANLEY WEISS .....
STANLEY WEISS
DEAN R. MAY

Dated: July 25, 1984

Appendix P

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I, Stanley Weiss, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on this day I caused a copy of this Notice of Appeal to the Supreme Court of the United States to be (i) served upon the following pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, by mailing said document, properly addressed, by first class mail to:

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Washington, D.C. 20590
Consolidated Rail Corporation
c/o Laurence Z. Shiekman, Esq.
Pepper, Hamilton & Schetz
123 South Broad Street
Philadelphia, Pennsylvania 19109;

and (ii) served in accordance with Rules 9 and 11 of the Special Court.

All parties required to be served have been served.

STANLEY WEISS

.....
Stanley Weiss

Dated: July 25, 1984

Appendix P

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed July 30, 1984, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Wharton and Northern Railroad Company hereby appeals to the Supreme Court of the United States from the final judgment of the Special Court Regional Rail Reorganization Act of 1973, entered on July 23, 1984.

This appeal is taken pursuant to 45 U.S.C. 743(d) and 28 U.S.C. § 1253.

CARPENTER, BENNETT & MORRISSEY
Attorneys for Appellant
Wharton and Northern Railroad Company

By: STANLEY WEISS .....
STANLEY WEISS
DEAN R. MAY

Dated: July 25, 1984

Appendix P

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I, Stanley Weiss, a member in good standing of the Bar of the Supreme Court of the United States, hereby certify that on this day I caused a copy of this Notice of Appeal to the Supreme Court of the United States to be (i) served upon the following pursuant to Rule 28.3 of the Rules of the Supreme Court of the United States, by mailing said document, properly addressed, by first class mail to:

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Washington, D.C. 20530
United States Department of Transportation
400 7th Street, S.W.
Washington, D.C. 20590
Consolidated Rail Corporation
c/o Laurence Z. Shiekman, Esq.
Pepper, Hamilton & Schetz
129 South Broad Street
Philadelphia, Pennsylvania 19109;

and (ii) served in accordance with Rules 9 and 11 of the Special Court.

All parties required to be served have been served.

STANLEY WEISS

.....
Stanley Weiss

Dated: July 25, 1984

Appendix Q

Appendix Q

PERTINENT PROVISIONS OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973, AS AMENDED

Section 303, 45 U.S.C. § 743, provides:

(a) Deposit with court.—Within 10 days after delivery of a certified copy of a final system plan pursuant to section 719(c) of this title—

(1) the Corporation, in exchange for the rail properties of the railroads in reorganization in the region and of railroads leased, operated, or controlled by railroads in reorganization in the region to be transferred to the Corporation or any subsidiary thereof, shall deposit with the special court all of the stock and other securities of the Corporation and certificates of value issued by the Association designated in the final system plan to be exchanged for such rail properties;

(2) each profitable railroad operating in the region and each State or responsible person (including a government entity) purchasing rail properties from a railroad in reorganization in the region, or from a railroad leased, operated, or controlled by a railroad in reorganization in the region, as provided in the final system plan shall deposit with the special court the compensation to be paid for such rail properties.

(b) Conveyance of rail properties.—(1) The special court shall, within 10 days after deposit under subsection (a) of this section of the securities of the Corporation, certificates of value issued by the Association, and compensation from the profitable railroads operating in the region, States and responsible persons, order the trustee or trustees of each railroad in reorganization in the region to convey forthwith to the Corporation or any subsidiary thereof the respective profitable railroads operating in the region, States, and responsible persons all right, title, and interest in the rail properties of such railroad in reorganization and shall

itself order the conveyance of all right, title, and interest in the rail properties of any person leased, operated, or controlled by such railroad in reorganization that are to be conveyed to them under the final system plan as certified to such court under section 719(d) of this title. In any case where the special court orders the trustee or trustees of a railroad in reorganization in the region to execute and deliver deeds or other instruments conveying rail properties to the Corporation or a subsidiary thereof or to a profitable railroad operating in the region or a State or responsible person, those deeds or other instruments may be executed, acknowledged, and delivered on behalf of the trustee or trustees by any person or persons who have been duly authorized to perform such acts on behalf of the trustee or trustees by the district court of the United States or any other court having jurisdiction over the respective railroad in reorganization in the region. Notwithstanding any provision of State or local law, in any case where deeds or other instruments have been executed, acknowledged, or delivered by a representative of the trustee or trustees of a railroad in reorganization in the region in accordance with the previous sentence, such execution, acknowledgment, and delivery, and the deeds or other instruments to which they pertain, shall have the same legal effect as they would have had if the trustee or trustees had themselves executed, acknowledged and delivered such deeds or other instruments.

(2) All rail properties conveyed to the Corporation or any subsidiary thereof, the respective profitable railroads operating in the region, States, and responsible persons under this section shall be conveyed free and clear of any liens or encumbrances, but subject to such leases and agreements as shall have previously burdened such properties or bound the owner or operator thereof in pursuance of an arrangement with any State, or local or regional transportation authority under which financial support from such State, or local or regional transportation authority was being provided on January 2, 1974, for the continuance of rail

passenger service or any lien or encumbrance of no greater than 5 years' duration which is necessary for the contractual performance by any person of duties related to public health or sanitation. Such conveyance shall not be restrained or enjoined by any court.

(3)(A)(i) Notwithstanding any other provision of this chapter if an interest in railroad rolling stock is included in rail properties conveyed pursuant to subsection (b)(1) of this section, and if such conveyance is in accordance with the requirements of clause (ii) of this subparagraph, the conveyance of such properties shall be deemed an assignment. Any such assignment shall relieve the assignor of liability for any breach which occurs after the date of such conveyance, except that such assignor shall remain liable for any breach, event of default, or violation of covenant which occurred (and any charges or obligations which accrued) prior to the date of such conveyance, regardless of whether the assignee thereof assumes such liabilities, charges or obligations. If any such liabilities, charges, or obligations (accrued prior to the date of such conveyance) are paid by or on behalf of any person or entity other than such assignor, such person or entity shall have a claim to direct reimbursement, as a current expense of administration, from such assignor, together with interest on the amount so paid.

(ii) A conveyance referred to in clause (i) of this subparagraph may be effected only if—

(I) the Corporation or a subsidiary thereof, the profitable railroad operating in the region, or the State or responsible person to whom such conveyance is made assumes all of the obligations under any applicable conditional sale agreement, equipment trust agreement, or lease with respect to such rolling stock (including any obligations which accrued prior to the date on which such properties are conveyed), and

(II) such conveyance is made subject to such obligations.

As used in this subparagraph, the term "railroad rolling stock" means assets which could be carried in Interstate Commerce Commission account numbers 52, 53, 54, and 57.

(B) Subject to the provisions of this paragraph, the provisions of this chapter shall not affect the title and interests of any lessor, equipment trust trustee, or conditional sale vendor under any conditional sale agreement, equipment trust agreement, or lease under section 205(j) of Title 11. A profitable railroad operating in the region, the Corporation or a subsidiary thereof, or a State or responsible person, to whom such a conveyance is made as assignee or as lessee, shall assume all liability under such conditional sale agreement, equipment trust agreement, or lease. Such an assignment or conveyance to, and such an assumption of liability by, such a profitable railroad, Corporation, subsidiary, State, or responsible person shall not be deemed a breach, an event of default, or a violation of any covenant of any such conditional sale agreement, equipment trust agreement, or lease so assigned or conveyed, notwithstanding any provisions of any such agreement or lease.

(4) Notwithstanding anything to the contrary contained in this chapter, if a railroad in reorganization has leased rail properties from a lessor that is neither a railroad nor controlled by or affiliated with a railroad, and such lease has been approved by the lessee railroad's reorganization court prior to January 2, 1974, conveyance of such lease may only be effected if the Corporation, profitable railroad, State, or responsible person to whom the conveyance is made assumes all future liability under such lease and all of the terms and conditions specified in the lease, including the obligation to pay the specified rent to the non-railroad lessor.

(5) Notwithstanding any covenant, undertaking, condition, or provision of any sort in any lease, agreement, or contract, the conveyance, transfer, assignment, or other disposition of such lease, agreement, or contract or of any interest therein to, or the assumption by, the Corporation or any subsidiary thereof, or a

profitable railroad of obligations thereunder, shall not be deemed a breach, an event of default, or a violation of any covenant of such lease, agreement, or contract.

(6) Notwithstanding anything to the contrary contained in this chapter or any other[1] provision of law, the special court shall include in its order such further directions as may be necessary to assure (A) that the operation and administration of the employee pension benefit plans described in section 775(a) of this title shall be continued, without termination or interruption, by the Corporation until such time as the Corporation elects to amend or terminate any such plan, in whole or in part; and (B) that appropriate transfers and assignments with respect to all rights and obligations relating to such plans shall be made to the Corporation for such purposes, without prejudice to payment of consideration for whatever rights any railroad in reorganization may have in any residual assets under any such employee pension benefit plan. No court shall enter any judgment against the Corporation with respect to any such rights, except that the special court may enter such a judgment in an order issued by it pursuant to subsection (c) of this section, after taking into consideration the rights and obligations transferred pursuant to this paragraph. All liabilities as an employer shall be imposed solely upon the railroad in reorganization in the event such plan is terminated, in whole or in part, by the Corporation within 1 year after the date of such transfer or assignment (except liabilities as an employer under the Employee Retirement Income Security Act of 1974 for benefits accruing during such period), except that in any case in which the Corporation, on or after the date of transfer or assignment as provided by this paragraph, terminates in whole or in part any such plan, the benefits under which are not guaranteed under title IV of the Employee Retirement Income Security Act of 1974, the Corporation shall guarantee the payment when due of the accrued pension benefits provided for thereunder at the time of

termination. The Corporation shall be entitled to a loan pursuant to section 721(h) of this title in an amount required for the adequate funding of accrued pension benefits under all plans transferred or assigned to the Corporation in accordance with this paragraph (whether or not terminated by the Corporation). For purposes of such section 721(h) of this title and notwithstanding any other provision of Federal or State law, amounts required for such adequate funding shall be deemed to be expenses of administration of the respective estates of the railroads in reorganization, due and payable as of the date of transfer or assignment of the plans to the Corporation.

(c) Findings and distribution.—(1) After the rail properties have been conveyed to the Corporation or any subsidiary thereof profitable railroads operating in the region, States and responsible persons under subsection (b) of this section, the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization, or of each railroad leased, operated or controlled by a railroad in reorganization, to the Corporation or any subsidiary thereof in exchange for the securities, certificates of value and the other benefits accruing to such railroad as a result of such exchange (taking into consideration compensable unconstitutional erosion, if any, which the special court finds to have occurred in the estate of each such railroad, during the bankruptcy proceeding with respect to such railroad) as provided in the final system plan and chapter, and

(ii) of rail properties of each railroad in reorganization, or of each railroad leased, operated, or controlled by a railroad in reorganization, to a profitable

railroad operating in the region, in exchange for compensation and other benefits accruing to such transferor as a result of such exchange (taking into consideration compensable unconstitutional erosion, if any, which the special court finds to have occurred in the estate of each such railroad, during the bankruptcy proceeding with respect to such railroad) State, or responsible person in accordance with the final system plan,

are in the public interest and ar fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 205 of Title 11, or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization;

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum; and

(C) what portion of the proceeds received by a railroad in reorganization from an entity other than the Corporation or any subsidiary thereof for the sale, lease, or transfer of property subject to an agreement under section 723 or section 725(a)(1) or (2) of this title reflects value attributable to the maintenance or improvement provided pursuant to the agreement.

(2) If the special court finds that the terms of one or more exchanges for securities, certificates of value and other benefits are not fair and equitable to an estate of a railroad in reorganization, or to a railroad leased, operated, or controlled by a railroad in reorganization (taking into consideration compensable unconstitutional erosion, if any, which the special court finds to have

occurred in the estate of each such railroad, during the bankruptcy proceeding with respect to such railroad) which has transferred rail properties pursuant to the final system plan, it may—

(A) enter a judgment reallocating the securities and certificates of value in a fair and equitable manner if they have not been fairly allocated among the railroads transferring rail properties to the Corporation or any subsidiary thereof, except that at least one share of series B preferred stock and one certificate of value shall be allocated to each such railroad; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the securities and certificates of value, order the Corporation to provide for the transfer to the railroad of other securities of the Corporation or certificates of value issued by the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

(C) enter a judgment against the Corporation if the judgment would not endanger the viability or solvency of the Corporation.

(3) If the special court finds that the terms of one of more conveyances of rail properties to a profitable railroad operating in the region, State, or responsible person in accordance with the final system plan are not fair and equitable, it shall enter a judgment against such profitable railroad, State, or responsible person. If the special court finds that the terms of one or more conveyances or exchanges for securities, certificates of value or other benefits are fairer and more equitable than is required as a constitutional minimum, then it shall order the return of any excess securities, obligations, or compensation to the Corporation or a profitable railroad, State, or responsible person so as not to exceed the constitutional minimum standard of fairness and

equity. The special court shall also find the amount of the payments, if any, which each profitable railroad has made on behalf of a transferor railroad in reorganization in accordance with section 721(h) of this title, for which payment the profitable railroad has not been reimbursed, as provided in section 721(h) of this title. Notwithstanding any other provision of this paragraph or of paragraph (4), the special court shall order the return to any such profitable railroad from compensation deposited by such profitable railroad pursuant to subsection (a)(2) of this section, of any such amount so found together with interest at the rate provided in section 721(h) of this title. In making any finding under this paragraph, the special court shall take into consideration compensable unconstitutional erosion, if any, which it finds to have occurred in the estate of a railroad in reorganization in the region, or of a railroad leased, operated, or controlled by such a railroad, during the bankruptcy proceeding with respect to such railroad.

(4) Upon making the findings referred to in this subsection, the special court shall order distribution of the securities, certificates of value and compensation deposited with it under subsection (a) of this section to the trustee or trustees of each railroad in reorganization in the region and to persons leased, operated, or controlled by such railroads who sc transferred or conveyed rail properties who conveyed right, title, and interest in rail properties to the Corporation and the respective profitable railroads, States, and responsible persons under such subsection.

(5) Whenever the special court, pursuant to subsection (b)(1) of this section, orders the transfer or conveyance of rail properties—

> (A) designated under section 716(c) (1) (C) or (D) of this title, to the Corporation or any subsidiary thereof, the United States shall indemnify the Corporation against any costs or liabilities imposed on the Corporation as the result of any judgment entered against the Corporation,

with respect to such properties, under paragraph (2) of this subsection; and

(B) to the National Railroad Passenger Corporation, a profitable railroad operating in the region, a State, or any other responsible person (including a governmental entity), the United States shall indemnify such Corporation, railroad, State, or person against any costs or liabilities imposed thereon as the result of any judgment entered against such Corporation, railroad, State, or person under paragraph (3) of this subsection;

plus interest on the amount of such judgment at such rate as is constitutionally required. The United States may, in its discretion, represent the Corporation or the National Railroad Passenger Corporation, such profitable railroad, State or responsible person, in any proceedings before the special court that could result in such a judgment against the Corporation under paragraph (2) of this subsection or against the National Railroad Passenger Corporation, such profitable railroad, State or responsible person, under paragraph (3) of this subsection. The Corporation, the National Railroad Passenger Corporation, any profitable railroad, State, or responsible person, which is represented by the United States of America shall cooperate diligently in whatever manner the United States shall reasonably request of it in connection with such proceedings. Neither the Corporation, or its subsidiaries, nor the National Railroad Passenger Corporation, any profitable railroad, State or responsible person, shall be obligated to reimburse the United States for any moneys paid by the United States pursuant to this section.

(6) Whenever the Corporation exercises an option to acquire, or acquires, interests in rail marine freight floating equipment pursuant to the recommendations of the final system plan, and the Corporation thereafter makes such floating equipment available to a profitable railroad operating in the region, a

State, or a responsible person including a government entity,[2] the United States shall indemnify—

(A) the Corporation against any costs or liabilities imposed on the Corporation as the result of any judgment entered against it, with respect to such equipment, under paragraph (2) of this subsection; and

(B) such profitable railroad, State, or responsible person against any costs or liabilities imposed thereon as the result of any judgment entered against such profitable railroads, State, or responsible person under paragraph (3) of this subsection,

plus interest on the amount of such judgment at such rate as is constitutionally required.

(d) Appeal.—A finding or determination entered by the special court pursuant to subsection (c) of this section or section 306 of this title may be appealed directly to the Supreme Court of the United States in the same manner that an injunction order may be appealed under section 1253 of Title 28: *Provided*, That such appeal is exclusive and shall be filed in the Supreme Court not more than 20 days after such finding or determination is entered by the special court. The Supreme Court shall dismiss any such appeal within 7 days after the entry of such an appeal if it determines that such an appeal would not be in the interest of an expeditious conclusion of the proceedings and shall grant the highest priority to the determination of any such appeals which it determines not to dismiss.*

(e) Transfer and other taxes and recording fees.—All transfers or conveyances of rail properties (whether real, personal, or mixed) which are made under this chapter (including transfers and conveyances which are made in accordance with a supplemental transaction pursuant to section 745 of this title or which

* As amended by Pub. L. No. 95-199, § 4, 95th Cong., 1st Sess. (Nov. 23, 1977).

are made at any time to carry out the purposes of title VII of the Railroad Revitalization and Regulatory Reform Act of 1976 or of section 791(d) of this title) shall be exempt from any taxes, imposts, or levies now or hereafter imposed, by the United States or by any State or any political subdivision of a State, on or in connection with such transfers or conveyances or on the recording of deeds, bills of sale, liens, encumbrances, or other instruments evidencing, effectuating, or incident to any such transfers or conveyances, whether imposed on the transferor or on the transferee. Such transferors and transferees shall be entitled to record any such deeds, bills of sale, liens, encumbrances, or other instruments and, consistent with the designations and applicable principles in the final system plan, to record the release or removal of any pre-existing liens or encumbrances of record with respect to properties so transferred or conveyed, upon payment of any appropriate and generally applicable charges to compensate for the cost of the service performed.

Section 306, 45 U.S.C § 746, provides:

(a) General.—On the date when the Corporation is required to deposit securities with the special court pursuant to section 743(a)(1) of this title, the Association shall deposit with the special court the certificates of value of the Association required by this section. The Secretary shall guarantee the payment of all certificates of value delivered in accordance with this subchapter. All guarantees entered by the Secretary under this section shall constitute general obligations of the United States of America for the payment or redemption of which its full faith and credit are pledged. Such guarantees shall be valid and incontestable except as to mutual mistake of fact or as to fraud or material misrepresentation by the holder of such certificates or the transferor of rail properties to which certificates of value of any series so guaranteed are issued.

(b) Number and distribution.—A separate series of certificates of value shall be issued to each railroad in reorganization in the region and each person leased, operated, or controlled by such a railroad that transfers rail properties to the Corporation or a subsidiary thereof. The number of certificates of value of each series to be deposited pursuant to subsection (a) of this section shall be equal to the number of shares of series B preferred stock of the Corporation which are required to be deposited by the Corporation with the special court, pursuant to section 7439(a)(1) of this title in exchange for the rail properties transferred to the Corporation or a subsidiary thereof by such transferor. Certificates of value of the appropriate series shall be distributed by the special court, pursuant to section 743(c)(4) of this title, at the same time to the same transferors, and in the same numbers of units as shares of such series B preferred stock are distributed to such transferor.

(c) Redemption.—(1) Certificates of value, of any series, shall be redeemed by the Association on December 31, 1987, or on such earlier date as the Board of Directors of the Association and the Finance Committee jointly may determine and specify.

(2) Each certificate of value of each series shall be redeemable for an amount, payable in cash, equal to its base value on the redemption date, minus—

> (A) the sum of the fair market value of the series B preferred stock applicable to such certificate, the fair market value of the common stock applicable to such certificate, and all cash dividends theretofore paid on any such series B preferred stock and on any such common stock; and
>
> (B) any sums paid to a transferor of rail properties to whom such series of certificates of value was issued resulting from sales or leases by the Corporation of properties

transferred to it by such transferor divided by the number of certificates of value distributed to such transferor.

(3) The number of shares of series B preferred stock and common stock applicable to each certificate of value of any series, pursuant to paragraph (2) of this subsection, shall be—

(A) one share of series B preferred stock (adjusted to reflect any stock splits, stock combinations, reclassifications or similar transactions affecting the number of shares of outstanding series B preferred stock following the date of distribution pursuant to section 743(c)(4) of this title); and

(B) the number of shares of common stock determined by dividing the total number of shares of common stock distributed pursuant to section 743(c)(4) of this title to the transferor receiving such series of certificates of value (adjusted to reflect any stock splits, stock combinations, reclassifications, or similar transactions affecting the number of shares of outstanding common stock following the date of distribution pursuant to section 743(c)(4) of this title) by the total number of certificates of value in the series so distributed to such transferor.

(4) The base value of each certificate of value of any series shall be the value obtained by (A) taking the net liquidation value, as determined by the special court, to which the transferor to whom such series of certificates of value is issued is entitled by virtue of transfers of rail properties, under section 743(b)(1) of this title to the Corporation or a subsidiary thereof; (B) subtracting the value of other benefits provided under this chapter, as determined by the special court; (C) adding such amount, if any, as the special court may determine shall be required after taking into consideration compensable unconstitutional erosion, if any, in the estate of a railroad in reorganization, or of a railroad leased, operated, or controlled by such a railroad, which the

special court finds to have occurred during any bankruptcy proceeding with respect to such railroad; (D) adding interest from the transfer date to the redemption date to be compounded annually at a rate of 8 percent per annum; and (E) dividing the resulting value by the number of certificates of value of such series distributed to such transferor. In determining such base value, the special court shall give due weight and consideration to the finding of the Association as to the net liquidation value to which each transferor is entitled by virtue of conveyances of rail properties under section 743(b)(1) of this title. For purposes of this paragraph, the term "rail properties" includes all rights with respect to employee benefit plans transferred and assigned to the Corporation pursuant to section 743(b)(6) of this title. Net liquidation value with respect to such rights shall be determined after taking into account all obligations finally transferred or assigned to the Corporation pursuant to such section.

(5) The fair market value of series B preferred stock and of common stock of the Corporation shall be determined in accordance with regulations prescribed by the Association, on the basis of the average price of each such security in the primary established market in which such securities are traded over a period of 120 consecutive trading days ending not less than 20 nor more than 40 trading days preceding the redemption date, or in the case of a security for which there is not an established trading market, on the basis of the fair market value thereof as determined by the majority vote of three experts in the valuation of securities, one to be selected by the Association, one to be selected by the directors of the Corporation elected by the holders of the security to be valued, and one to be selected by the two first selected.

(d) Authorization for appropriations.—There are authorized to be appropriated to the Secretary such sums as are necessary to discharge the obligations of the United States arising under this section.

APPENDIX R

Appendix R

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

August 2, 1984

Dean R. May, Esq.
Carpenter, Bennett & Morrisey
744 Broad Street
Newark, New Jersey 07102

RE: *Central Jersey Industries, Inc., et al.* v. *United States Rrailway Association and United States, et al.*
No. ----

Dear Mr. May:

The Court today entered the following order in the above-entitled case:

"The statement of appellants as to dismissal of the appeal was received July 26, 1984 and presented to the Court for its consideration. The appeal from the Special Court, Regional Rail Reorganization Act of 1973, to review the final judgment entered July 23, 1984 shall not be dismissed at this time under Section 303(d) of the Regional Rail Reorganization Act of 1973. The time to docket the appeal is extended to and including September 21, 1984. The application for leave to file a statement as to jurisdiction in excess of the page limitations is granted provided the statement as to jurisdiction does not exceed forty pages. Justice Brennan took no part in the consideration or decision of this order."

Very truly yours,

ALEXANDER L. STEVAS, CLERK

By

Francis J. Lorson
Chief Deputy Clerk

gtb
cc: Honorable Rex E. Lee, Solicitor General
Lawrence Z. Sheikman, Esq.
James Davey, Esq., Clerk
Special Court (Misc. No. 76-1)

APPENDIX S

CA-900

Appendix S

SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed June 23, 1978, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER SECTIONS 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT

SECOND PRE-TRIAL ORDER

WHEREAS, in accordance with the First Pre-Trial Order, the Court has received the written submissions of counsel dated May 10, June 7, and June 15, 1978, and heard oral argument of counsel at a pre-trial conference on June 21-22, 1978; and

WHEREAS, the Court has determined that, in lieu of the procedure contemplated by the first ordering paragraph on page 5 of the First Pre-Trial Order, it should itself prepare this order;

NOW THEREFORE, it is ORDERED that:

(1) The Trustees of the Penn Central Transportation Company be, and they hereby are directed to submit to the Court and provide to the Government Parties and other transferors on December 1, 1978, their entire direct evidence (all of which shall be in writing) concerning the values that would have been received for dispositions of their properties for continued rail use in the absence of the Rail Act.

(2) All other transferors be, and they hereby are directed to submit to the Court and provide to the Government Parties and other transferors on December 31, 1978, their entire direct evidence (all of which shall be in writing) concerning the values that

would have been received for dispositions of their properties for continued rail use in the absence of the Rail Act.

(3) The Government Parties be, and they hereby are directed immediately to commence preparation, to the extent they have not already done so, of their evidence concerning the values that the transferors would have received for the disposition of their properties for continued rail use in the absence of the Rail Act.

(4) The Government Parties be, and they hereby are directed to submit to the Court and all other parties, on August 15, 1978, a detailed description of the rail use evidence which the Government Parties (a) have developed at that time and (b) insofar as practicable, which they intend to develop, concerning the values the transferors would have received in the absence of the Rail Act. Such filings shall identify studies and underlying materials upon which the Government Parties then intend to rely. Without limiting the generality of the foregoing, the Government Parties shall then advise the Court and all other parties whether and, if so, to what extent it will rely on studies relating to the anticipated performance of ConRail, on data concerning its actual performance, or on studies relating thereto, and, if it elects to do so, shall immediately undertake such further analysis as will be necessary to render such studies and data relevant to the issues here to be determined. The Government Parties shall also make a good faith effort in such submissions to address fairly and specifically the contentions contained in the transferors' May 10 Statements concerning the identity of the rail lines that would have remained in rail service in the absence of the Rail Act and the methodologies the transferors intend to use in determining the identity and values of those lines.

(5) The Government Parties be, and they hereby are directed to submit to the Court and all transferors, on August 31, 1978, a list identifying each document submitted on behalf of any transferor (or any creditor or stockholder interest therein) in any

reorganization court, Interstate Commerce Commission or Congressional proceedings affecting such transferor upon which the Government Parties then intend to rely in the trial of the rail use issues.

(6) The transferors be, and they hereby are directed to file on October 2, 1978, lists of the witnesses expected to testify in support of their affirmative cases, their qualifications, and a summary of the subject matter of their testimony.

(7) The transferors and the Government Parties be, and they hereby are directed to commence promptly and to complete by October 2, 1978, the exchange of basic data and related materials being used by witnesses who are expected to testify with respect to rail use.

(8) The transferors be, and they hereby are directed to provide the Court, the Government Parties, and each other, on October 2, 1978, with a supplementary statement which, insofar as feasible, shall make more specific their proposals concerning the likely acquirers of properties that they contend would have been acquired for continued rail use in the absence of the Rail Act. While the Court is not prepared to endorse the request of the Government Parties that all transferors should be required to join a single scenario describing a particular purchaser for each route segment, it continues to emphasize, as it did in its opinion of Oct. 12, 1977, see 445 F. Supp. at 1009, the desirability, from the standpoint of the transferors as well as of Government Parties and the Court, of the transferors' coming as close as possible to that goal. In these same filings each transferor shall indicate to what extent it intends to rely on evidence of "opportunity costs" as that term is defined in paragraphs (82) - (90) of the Statement of the Penn Central Trustees dated May 10, 1978.

(9) The Government Parties, to the fullest extent practicable, be, and they hereby are directed to submit, on January 31, 1979, the affirmative evidence (all of which shall be in writing) which

they intend to offer with respect to certain rail use issues which are in the nature of general affirmative defenses as distinguished from denials of the affirmative cases of the transferors. These issues include (a) the amounts that would have been required to rehabilitate the properties proposed for transfer; (b) the ability of private purchasers to finance the acquisition and rehabilitation costs of properties proposed for transfer to them; (c) the ability of public agencies and authorities to finance the acquisition and rehabilitation costs of properties proposed for transfer to them; (d) the legal power of public agencies and authorities to acquire such properties; (e) the extent to which the Interstate Commerce Commission would condition the acquisition of rail lines by profitable railroads upon those railroads' acquisitions of unprofitable lines; (f) the extent to which public agencies and authorities would insist upon receiving profits from other rail operations as a condition to their acquisition of properties; (g) the impact of labor protection obligations upon the values that the transferors would have received for their properties; (h) the impact that alleged breaches of executory contracts would have upon the values the transferors would have received for their properties; and (i) the "macroeconomic" conditions that would have affected the disposition process. Such submission shall include a witness list similar to that described in paragraph (6).

(10) In preparing their direct cases, the transferors (including the Trustees of the Erie Lackawanna) are entitled to assume that, in the absence of the Rail Act, serious consideration and discussion of dispositions for continued rail use would have begun not later than February, 1973. The direct cases shall contain evidence as to when the dispositions would have occurred. In preparing such evidence the transferors shall take into account the Court's observations in its CUE opinion, 439 F. Supp. 1351 (1977), with respect to the burden on transferors in showing that such dispositions would have taken place prior to April 1, 1976.

(11) As at present advised, the Court is not disposed to entertain argument that any transferor would have obtained a strategic advantage over other transferors (as distinguished from such advantages as ending of deterioration, entitlement to interests, etc.) by negotiating or consummating a disposition at an earlier date than other transferors.

(12) As at present advised, the Court believes that more rapid progress can be made by following in general the proposal of the Government Parties for a single trial encompassing all rail use issues than the proposals of various transferors for separate trials on separate issues; is not favorably disposed toward separation of the trials with respect to properties designated for intercity freight service and property designated primarily for passenger service; and is favorably disposed to the proposal that the trial with respect to what the Penn Central Trustees have termed "smaller, specialized properties" (May 10, 1978, Statement (4)) should be deferred until the basic network has been established. In consequence each transferor's direct case should identify such "smaller, specialized properties" but need not contain valuation evidence with respect thereto.

(13) The Court has given serious consideration to the request of the Trustee of the Central Railroad Company of New Jersey (CNJ) for a hearing independent of the hearing relating to transferors generally but has concluded that possible interrelationships between the cases of the CNJ and of other transferors make such a complete separation impracticable. However, arrangements will be made whereby any hearings with respect to CNJ (and other smaller transferors desiring such treatment) will be set for a specified date and such transferors will be given adequate notice of dates when testimony having special pertinence to their cases will be taken.

(14) After receipt of the transferors' direct cases the Government Parties shall promptly apply for such further discovery as they believe should be required. Such applications shall be made

as soon as practicable with respect to each witness and, in any event, shall be made no later than January 31, 1979. Any such request shall include an estimate of the time required for discovery. The transferors shall follow a similar procedure with respect to the evidence which the Government Parties are directed to furnish by paragraph (9) of this order, except that the final date for seeking discovery shall be March 5, 1979.

(15) To the maximum extent feasible, each transferor shall submit its direct rail use case in such form as will permit the Court to make necessary adjustments if it is persuaded by some but not all of a transferor's contentions. Alternatively, a transferor may submit a "maximum" and a "minimum" case. The Court will not view with favor any post-trial application by a transferor for leave to file a new direct case.

(16) The Court approves the suggestion, endorsed by almost all parties, that preparation for trial of non-rail use issues shall be deferred for the present. This is without prejudice to consideration of any new proposals that may be made on this score, see Penn Central Trustees' June 15, 1978 statement, p. 22.

(17) The Court considers it to be premature to deal at this time with the issues relating to masters outlined in the ordering paragraphs on pages 4 and 5 of the First Pre-Trial Order. It requests that the proposals directed by the penultimate paragraph of said order include the names of persons who might be available to serve as court-appointed experts under Federal Rule of Evidence 706 and shall take account of the availability of all persons suggested.

HENRY J. FRIENDLY

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

Roszel C. Thomsen
Judge

June 23, 1978

Appendix S

IN THE SPECIAL COURT

REGIONAL RAIL REORGANIZATION ACT OF 1973

Filed June 12, 1981, James F. Davey, Clerk

Special Court—Misc. No. 76-1

IN THE MATTER OF THE VALUATION PROCEEDINGS UNDER §§ 303(C) AND 306 OF THE REGIONAL RAIL REORGANIZATION ACT OF 1973

SIXTH PRETRIAL ORDER

Whereas the Court has conducted proceedings relating to this order as outlined in its Memorandum and Order to Show Cause dated May 12, 1981, has held the hearing set therein for June 12, and has duly deliberated on the arguments of counsel for the transferors and the Government Parties (GPs);

NOW, THEREFORE, it is ordered that:

1. All parties shall proceed with maximum expedition to produce their entire direct cases relating to the realizable nonrail use value of all of the transferors' conveyed properties including those characterized in the Statement of the Penn Central Trustees dated May 10, 1978, paragraph (4), as "smaller, specialized properties". The cases shall include properties (which should be clearly identified) which transferors contend could have been sold for rail use at prices higher than they would have commanded for nonrail use. To the extent that this Court shall agree with such contentions, such properties can be eliminated at an appropriate time, except that if the Court finds that a property would have been sold at or at a percentage of or fixed dollar amount above or below value for nonrail use, it will remain essential to determine the latter figure.

2. All parties shall exert maximum efforts promptly to reach stipulations as to the inventory of the transferors' conveyed assets. Each transferor is directed to file a statement by July 15, 1981 identifying and describing with particularity each asset transferred pursuant to the Rail Act which has not been the subject of an inventory stipulation and for which the transferor claims nonrail use value.

3. The parties shall continue to attempt to reach stipulations concerning real estate values and other nonrail use values on which it appears that stipulations, particularly as to the base value of real estate and equipment unit values, should be attainable. The Court would expect this to be practicable with respect to all or nearly all equipment and most items of real estate. If any party believes that appointment of one or more special masters would facilitate the reaching of such stipulations, it shall promptly so advise the Court, with appropriate notice to the adverse party. The Court may take an unreasonable refusal to stipulate into account in assessing the costs of these proceedings.

4. Existing appraisals of real estate, facilities and equipment unit values that are intended to be offered in evidence shall be exchanged as soon as possible and discovery thereon shall be conducted on an accelerated informal basis.

5. Trial of the nonrail use value of the transferors' properties shall be on written direct evidence, subject to cross-examination in deposition format, in accordance with the procedures developed in the rail use phase of the case.

6. All parties are directed to submit proof as direct evidence rather than as rebuttal evidence to the maximum extent feasible. The Court will look with disfavor upon efforts by any party to hold back until the rebuttal stage of the nonrail use phase of the proceedings evidence that could have been produced and submitted as part of a party's direct case.

7. The transferors and the GPs shall submit their direct evidence on real estate base values not later than October 12, 1981. Such evidence includes adjustments for such factors as size, access, topography, zoning, location and title defects; it does not include such factors as glut, disposition costs, corridor premiums, discount for delay in disposition, and interim income. The parties shall also submit their direct evidence on unit values for facilities and equipment not later than October 12, 1981, again excluding such factors as glut, disposition costs, discount for delay in disposition, and interim income. The parties shall submit the balance of their direct cases not later than December 1, 1981 (including, with regard to lines kept in rail use but sold for a price based on non-rail use values, any adjustments for the perceptions of the parties negotiating or otherwise setting the sale price). If the Court's decision on the rail use phase of the case (or a summary thereof) shall not have been filed by November 2, 1981, evidence otherwise due December 1, 1981 shall be due on a date thirty days after such filing by the Court. In that event, subsequent dates will be adjusted accordingly. The Court does not anticipate this event.

8. At least fifteen days prior to each evidentiary submission, the parties shall file a statement that (a) lists all witnesses whose testimony will be submitted, (b) describes the issues on which each witness will testify, (c) identifies any other persons or studies providing material input for the witness' testimony and describes that input, and (d) states for each witness any dates within the cross-examination period when the witness will (for good reason) be unavailable for cross-examination. Any studies or materials relied upon by the witness' testimony should either be appended to the testimony or copies should be made available to opposing counsel at the time the testimony is submitted.

9. Immediately upon the filing of the statements described in § 8 of this order, the parties' Steering Committees shall meet and attempt to agree upon a joint proposal for a schedule for discovery

and cross-examination. The Court sees no reason why substantially all discovery, as distinguished from cross-examination, on the material directed to be submitted on October 12, 1981, cannot be conducted in the interval between October 12 and December 1. The schedule shall be so designed that cross-examination on the nonrail use phase of the case will be concluded by April 1, 1982.

10. All rebuttal evidence shall be submitted not later than May 15, 1982. The parties' Steering Committees shall thereafter proceed in a manner similar to that set forth in § 9 of this order. The schedule for discovery and cross-examination shall be so designed that cross-examination will be completed not later than July 15, 1982.

11. Each transferor shall be required to submit data only with respect to its own properties. If any party wishes to argue that sales of other properties, notably properties of Penn Central or of other transferors whose settlements have been approved prior to the dates set for submission, would have adversely affected the prices obtainable by a transferor, such party shall have the burden of presenting evidence with respect to the amount, time and pricing of such sales.

12. The request of CNJ for an exemption from the procedures herein made applicable to other transferors is denied.

HENRY J. FRIENDLY

Henry J. Friendly
Presiding Judge

JOHN MINOR WISDOM

John Minor Wisdom
Judge

ROSZEL C. THOMSEN

Roszel C. Thomsen
Judge

Dated: June 12, 1981.

APPENDIX T

Appendix T

Oral Opinion of the Honorable Anthony T. Augelli, *U.S.D.J.*, of March 26, 1971

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

IN THE MATTER OF

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Debtor.

No. B 401-67

Newark, New Jersey

March 26, 1971

The Court: Because of the time element involved in this case, and the consequences of my decision, I think the parties involved in this application should know right now what conclusion I have reached.

As you know, I have been living with this case since its inception, four years ago. Some of the many problems involving this debtor were set out in an opinion I filed on November 2, 1970. Reference thereto is made for the Court's observations concerning the financial condition of the debtor, the need for money to continue operations, the dire consequences that would follow a cessation of operations, the impact such cessation would have on the economy of the State, and so forth.

After the conclusion of yesterday's arguments I again reviewed Mr. Timpany's affidavit of March 20th and the exhibits annexed thereto. Incidentally, those exhibits constitute the record that was presented to and considered by the Interstate Commerce Commission and the Secretary of Transportation in Washington.

Based on that record, the I.C.C. has approved the issuance of $6 million worth of Trustee's certificates and the Secretary of Transportation has guaranteed the payment thereof. The order of the I.C.C. and the findings of the Secretary have been marked in evidence in these proceedings as Exhibits T-1 and T-2, respectively.

In addition to the record just mentioned, I have reviewed my notes on the testimony given here by Mr. Stone, Mr. Young, Mr. Cogliati and Mr. Timpany. I have also examined Exhibits DMH-1, 2, 3, 4, 5 and 6 that have been marked in evidence.

Consideration has also been given to the Wyer-Dick report on the estimated liquidation value of the debtor's assets, which report was filed with the Clerk of this Court on June 25, 1970.

I again read the transcript of the hearings that were held before me on February 9th and 10th, at the conclusion of which I made an order authorizing the Trustee to apply to the I.C.C. and the Secretary of Transportation for Federal aid under the Emergency Rail Services Act of 1970.

The arguments made and the briefs of counsel have also been considered, as well as the cases cited therein. And, of course, I have had the benefit of the arguments made by counsel yesterday.

This issue before me at this time is whether the Trustee should now be permitted to issue the certificates that have been authorized by the I.C.C. and guaranteed by the Secretary of Transportation and use the money realized from the sale of such certificates for the continued operation of the debtor.

The application of the Trustee for authority to issue the guaranteed certificates is opposed by the Manufacturers Hanover Trust Company, the Indenture Trustee of the debtor's general mortgage securing some $42 million worth of bonds. Manufacturers is represented here by Mr. Ward.

Also opposed is the bondholders' committee, represented here by Mr. Goodstein. That committee holds some $17 million worth of the debtor's bonds.

Opposition to the application has also been voiced by the Lehigh Coal & Navigation Company.

In favor of the Trustee's application are the State of New Jersey, the labor unions that have been permitted to intervene in the reorganization proceedings, the Reading Company and the Carteret Industrial Association.

After consideration of the arguments pro and con, and the record before me, I have concluded to permit the Trustee to issue certificates for the full amount authorized by the I.C.C. and guaranteed by the Secretary of Transportation.

At the outset, let it be noted that the present Trustee of the debtor, Mr. Timpany, has only been in office since January 28, 1971. His qualifications as an experienced and capable railroad man are not challenged. Indeed, even those who oppose the present application concede that he is a knowledgeable and highly competent man in his field. And it is also worthy of note that the plan the Trustee has in mind for the rehabilitation of the debtor, and which is fully disclosed in the exhibits annexed to his affidavit, is not criticized by anyone as being impracticable. No fault has been found with what has been called here the Trustee's Blueprint For Survival.

Mr. Ward, speaking for the Indenture Trustee, and Mr. Goodstein, speaking for his committee, want the Trustee to succeed in his endeavors to rehabilitate this sick railroad.

Mr. Goodstein would be agreeable to the issuance of Trustee's certificates to the full $6 million authorized and guaranteed, provided, however, that as a condition to such issuance the Trustee be directed to file with the I.C.C. an application for abandonment of the debtor's present operation. From that point on, Mr. Goodstein argues, there should not be too much difficulty in working out an acceptable plan of reorganization of the debtor.

The effect that total—or even partial—abandonment of operations would have on the labor situation is one of the factors that must be considered in the over-all evaluation of a feasible plan of reorganization.

The Indenture Trustee argues vigorously that the debtor has no chance of becoming a self-sustaining operation. It points to past performance and uses that as a base for its pessimistic conclusion.

Adding $6 million worth of new debt to the present financial structure of the debtor, which new debt would enjoy a priority over the lien of the mortgage, would, it is argued, constitute an unconstitutional taking of the bondholders' property, a taking in violation of the due process and just compensation clauses of the Fifth Amendment.

If the debtor is not to be shut down—and the Indenture Trustee expressly states that it does not want this happen, if it can possibly be avoided—it is suggested that the Trustee might look elsewhere for money—perhaps the State of New Jersey; perhaps the shippers; perhaps other sources could be found that would be willing to advance funds, without, of course, impairing the present priority in lien that is enjoyed by the bondholders. But the naked fact is that there are no such sources presently available.

In considering the Trustee's present application I have not lost sight of the fact that the Indenture Trustee has filed with the Court a petition for dismissal of the reorganization proceedings pursuant to Section 77(c) of the Bankruptcy Act. That petition, with the consent of the parties concerned, was referred to the Interstate Commerce Commission for consideration and recommendation as to whether or not the proceedings should be dismissed.

It is argued that pending disposition of that application the Trustee should not be authorized to incur a new debt, because if the reorganization proceedings are dismissed, the debtor's estate will be returned to its board of directors, presumably for the purpose of liquidation.

I find no merit to this argument. What disposition will be made of the dismissal application cannot be known at this time. And when a decision in that matter will be reached is likewise a question that cannot now be answered.

The Trustee has testified that present funds will permit operation of the debtor into the month of April. And we know that when the money that is now in the till runs out the wheels will stop turning. If I were to deny the Trustee's application to issue the guaranteed certificates, operations would cease, for lack of cash, and the application referred to the I.C.C. would become moot. In effect, I am being asked to decide at this time the same issues referred to the I.C.C. on the dismissal petition filed with me by the Indenture Trustee.

It is argued that the legal standards for authorizing the issuance of Trustee's certificates set forth in Section 77(c)(3) of the Bankruptcy Act have not been met by the Trustee in this case. A reading of that Section of the Bankruptcy Act, and the cases cited in both briefs, satisfy the Court that the statutory requirements have been fully met. Good cause has been shown for the issuance of such certificates—either they issue or we stop operating; that the issuance of such certificates for the purpose of assuring the continued operation of the debtor is a lawful purpose; and that such certificates may be granted priority is a matter that is not open to question.

Moreover, the I.C.C. has made a specific finding that the issuance of the $6 million worth of Trustee's certificates here involved is for a lawful object and is compatible with the public interest. That finding, while it might not be binding on me, is nevertheless entitled to some consideration.

I likewise find no merit in the argument that the issuance of the Trustee's certificates in this case will result in an unconstitutional taking of the bondholders' property. In support of this argument the Indenture Trustee leans rather heavily on the Wyer-Dick report, which sets forth the estimated liquidation value of the debtor's assets. That report shows that as of June 30, 1968, the estimated net liquidation value of all of the debtor's assets was $79,654,000.

But I cannot accept that figure for the purposes of the Trustee's present application. The reason therefor is made clear by the

report itself. It is stated therein that the liquidation value of $79,654,000 is a theoretical or hypothetical value, because it is based upon the assumption that all of the physical facilities of the debtor would be removed, and that all of the customers served exclusively by the debtor would be deprived of rail service. The report goes on to say that a more realistic value would be obtained if certain lines and terminal facilities would be candidates for purchase by other railroads.

With respect to the physical properties of the debtor, as to which only scrap value was assigned, the report points out that such value was based on the extremely low level of scrap prices prevailing as of June 30, 1968. The report, which was completed in June of 1970, states that on the basis of October, 1969, price levels the estimated liquidation value would be increased by a minimum of $900,000, and that the level of scrap prices was even higher as of the date of the report in June of 1970.

When the Wyer-Dick report is viewed in light of Mr. Timpany's testimony, and his Blueprint For Survival, I think it is obvious that the Indenture Trustee is leaning on a very weak reed.

In further support of its argument that there will be an impermissible taking of bondholders' property, the Indenture Trustee assumes that the money borrowed on the guaranteed certificates will be irretrievably lost when used by the Trustee in furtherance of his plan for the reorganization of the debtor. The Indenture Trustee has not satisfied this Court that such results will necessarily follow. Reliance is placed on an examination of the debtor's records made by the accounting firm retained by the Indenture Trustee. Data secured by the accountants is reflected in Exhibits DMH-1, 2, 3, 4, 5 and 6.

The sum and substance of the testimony given with respect to these exhibits by Mr. Stone and Mr. Cogliati is that the debtor is a dead railroad and that there is no real hope of achieving viability.

There is no question about the fact that projections and assumptions abound in this case. In balancing all of the evidence

adduced on behalf of the bondholders against what has been termed the hopes and aspirations of the Trustee, this Court finds that the so-called hopes and aspirations of the Trustee are based on a pretty solid factual foundation, and that there is every likelihood that, aided by the infusion of the $6 million, the Trustee will come up with and acceptable plan of reorganization within a reasonable period of time.

Even if it be assumed that the issuance of the guaranteed certificates would result in a dilution of the bondholders' security, such dilution would not necessarily be unconstitutional. The rights of bondholders are not absolute. The interests of the public must be considered as well as theirs.

And in this connection, while the cases are long cases, I suggest a careful reading of the New Haven inclusion cases, reported in 399 U.S. 392; the Penn Central merger cases, reported in 389 U.S. 486; and the Continental case, reported in 294 U.S. 648.

I am familiar, of course, with the Central Railroad case, reported in 421 F. 2d 604. But I do not believe that has any application to the matter now before me, nor do I believe that that is the law of this case.

The case of In Re Prima, reported in 88 F. 2d 785, in my opinion is clearly distinguishable.

And I am familiar with the several opinions handed down by Judge Anderson in connection with the reorganization proceedings involving the New Haven. However, as we know, the New Haven was finally taken over by the Penn Central. The story of that take-over, of course, is told in the New Haven inclusion cases, the citation of which cases I have already mentioned. Judge Anderson did not have to reach the decision as to whether or not there had been an unconstitutional taking of bondholders' property.

And I know that counsel are familiar with Judge Fullam's opinion in the Penn Central reorganization proceedings, wherein the New Haven Trustees' objection to the issuance of Trustee's certificates in that case was overruled.

The Third Avenue case, reported in 198 F. 2d 703, is not strictly a Trustee's certificate case. Hence, I do not think it is relevent in this matter.

In its brief the Indenture Trustee agrees that if the expenditure of funds to defray operating expenses buys time, during which the debtor's finances can be reorganized and stabilized, and thereby eliminate the necessity for involuntary liquidation, the risk to creditors' interests posed by a forced reordering of priorities would be minimized, and this Court might properly authorize the issuance of the guaranteed certificates.

Based on the record in this case, I have no difficulty in concluding that a utilization of the proceeds of the sale of the guaranteed certificates to defray operating expenses will give the Trustee a much needed breathing spell and time within which to formulate an acceptable plan of reorganization.

I find that the Trustee has demonstrated that, with the help of the new money, a successful reorganization of the debtor is indeed feasible and that such reorganization will be effected within a reasonable time.

And I want to stress that even if the issuance of the guaranteed certificates did result in some dilution of the bondholders' present security position, I would still feel obliged, in the exercise of my discretion, to grant the Trustee's application. The basic argument against the issuance of the Trustee's certificates is that there is no present assurance that a successful reorganization can be effected. The opposing parties have not only failed to satisfy the Court that the debtor cannot be successfully reorganized, but there has also been a failure of proof that the $6 million put into operations will go down the drain and be lost.

The exhibits annexed to Mr. Timpany's affidavit of March 20th, as I said before, are the record that resulted in the exhibits that have been marked in evidence here as T-1 and T-2; those exhibits speak for themselves. The I.C.C. has authorized the Trustee to issue $6 million worth of certificates, finding that the

issuance is for lawful purpose and compatible with the public interest.

The Secretary of Transportation, after consultation with the I.C.C., has guaranteed the certificates and has made the requisite findings of face required by Section 3(a) of the Emergency Rail Services Act of 1970.

The findings of the I.C.C., with its expertise, and the findings of D.O.T., with its expertise, are certainly entitled to some weight. And certainly no evidence has been produced before me that would militate against the findings made by the Secretary of Transportation: (1) that cessation of essential transportation services by the debtor would endanger the public welfare; (2) that such cessation of services is imminent; (3) that there is no other practicable means of obtaining funds to meet payroll and other expenses necessary to provide such services than the issuance of the certificates; (4) that such certificates cannot be sold without a guarantee; (5) that the debtor can reasonably be expected to become self-sustaining; and (6) that the probable value of the debtor's assets, in the event of liquidation, provide reasonable protection to the United States.

It is my independent judgment that each of the foregoing findings find ample support in the record that is before me in these proceedings. Mention was made by Mr. Goodstein of a condition relating to Finding No. 5 of the Secretary of Transportation. It reads as follows:

"Accordingly, as a condition to a guarantee, the Trustee will be required to undertake diligent efforts to implement the plan according to a specified and strict time schedule."

It is my opinion that this condition is not to be construed as in any manner affecting the marketability of the guaranteed certificates. In other words, it should be clearly understood that when the guaranteed certificates are sold there are no hidden gimmicks anywhere that would affect the marketability of such certificates or their guarantee by the Secretary.

One final note: I have read and re-read the Trustee's Blueprint For Survival. Even without the specific findings made by the Secretary of Transportation, I would have no hesitancy in permitting the issuance of Trustee's certificates in this case, after authority for their issuance has been obtained from the I.C.C. The Trustee's program for the rehabilitation of this debtor is, in my opinion, a sound program and entirely feasible. Certain unprofitable operations are to be discontinued. The prospects are more than promising that the negotiations presently under way will result in a decided improvement in the condition of this debtor.

Schedule B of the exhibits annexed to the Trustee's affidavit outline what may reasonably be expected to happen in this case. Of course, assumptions are made. But those assumptions, in my opinion, have substance.

What is the alternative to the program that is offered by the Trustee? As I see it, a denial of the Trustee's present application means the end of all operations. I firmly believe that the new Trustee entitled to every opportunity to bring his plan to fruition. The public interest should not be sacrificed solely to protect the interest of the bondholders.

I am in full agreement with the principle that bondholders should not be asked to finance a railroad operation that is doomed to failure. But, in my opinion, we do not have that situation here. There is a good chance that with the changes proposed to be taken by the Trustee the debtor will emerge as a viable railroad.

For the reasons that I have stated, the application of the Trustee will be granted to the extent of the $6 million worth of Trustee's certificates authorized by the I.C.C. and guaranteed by the Secretary of Transportation. Withdrawal of funds resulting from the sale of certificates will only be allowed on the Trustee's petition setting forth the amount to be drawn down and the reasons for such withdrawal. Those applications for withdrawal of funds, of course, will be made on notice to all parties in interest and will be subject to approval by this Court.

Gentlemen, I realized that I have given a rather rambling opinion here. But I did not want to delay matters. If an appeal is to be taken from my decision, I would appreciate it if counsel would let me know so that I may edit what I have said here orally and make more specific the reasons why I have granted the Trustee's application.

Mr. Weiss, you will please submit an appropriate order.

Appendix T

Oral Opinion of the Honorable Anthony T. Augelli, *U.S.D.J.*, of December 8, 1972

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

IN THE MATTER OF

CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Debtor.

No. B 401-67

Newark, New Jersey

December 8, 1972

The Court: Because of the public interest in this matter and the newspaper publicity that the hearing here has received, I have decided to make known my decision today.

Number 1, I have decided preliminarily that I do have the power to grant the relief.

Number 2, the bondholders will not be precluded by the doctrine of collateral estoppel.

And I might say I am familiar with the mortgage indenture. I am familiar with the Wyer, Dick valuation study. And, of course, for five years I have lived with this case—a little over five years. I know all of the operating losses and the difficulties that the railroad has encountered in its operations. I can appreciate, also, that it does need more money if it is going to operate its passenger services at less than the tremendous losses being incurred today on the basis of an avoidable loss contract.

But I am afraid that on the basis of the present record I cannot give the bondholders the relief they seek, namely, that I shut

down total operations of the Central Railroad Company of New Jersey on some date to be fixed by me.

I think that is a drastic step and one that should only be taken on a sufficient record.

I have in mind that on December 11 I will be confronted with another application, and this by the trustee. In his petition he asks for an Order authorizing him to terminate the current subsidy contract with the State of New Jersey as of December 31, 1972, and at that time to terminate all passenger service of the debtor as of 11:59 p.m. on that date, unless prior thereto the State of New Jersey and the trustee—Mr. Timpany—enter into a full cost of service passenger subsidy agreement.

What I will do with that one, of course, I don't know. And my dismissal of Mr. Ward's application at this time is without prejudice to his coming into that proceeding, if he wishes to.

I do think that we have shown some improvement. We have got a long way to go. but I don't think that as of yet the assets of this estate have so eroded that the constitutional line has been passed, where there has been a taking of the bondholders' property in violation of the Fifth Amendment. I don't think we have reached that point yet.

That is not to indicate that we might not reach it. But I am deciding the application that is pending before me on the basis of the present record.

We cannot lose sight of the fact that some progress has been made and that conditions subsequent to March of 1971 have helped rather than hindered the estate, and consequently those who hold security interests in the estate.

In Judge Anderson's opinion, the one reported in 281 F. Supp. 65, there is laid down this rule, or this statement made by the ICC, and approved by the Supreme court in its New Haven inclusion opinion, approving the Penn Central merger. And that statement reads as follows—it is on page 67:

> "It is a fundamental aspect of our free enterprise economy that private persons assume the risks attached to their investments and the New Haven creditors can expect no less because the New Haven's properties are devoted to a public use."

Then Judge Anderson goes on to quote Justice Fortas' opinion. Justice Fortas was then speaking for the majority. And he said that while the rights of the bondholders are entitled to respect, they do not command Procrustean measures.

I used the word "drastic" instead of "Procrustean."

I think we have got to be realistic. and I, for one, am not going to permit this railroad to continue operating to the detriment of anybody—bondholders or anyone else. I do think the public interest must be served. And I think it will be served by a continuation of service, at least for the time being.

We have had some changes here, and they are all changes that I think are very beneficial, and will be of benefit to the estate generally. And I have reference to a few of them that were mentioned here.

One is the Liberty Park deal, where there is a lease of 17 acres in that area. There was also a $10 million figure thrown around—negotiations on the sale of the property. Whether that will materialize—apparently it is not enough, because Mr. Wachenfeld has some litigation concerning that particular property.

We have the layoff of the employees. An unfortunate thing, but nevertheless necessary. Sometimes drastic action must be taken. I have always said that I wished that there was more cooperation between the labor force and management in this particular railroad. I always thought that work rules should have been changed long, long ago. But we finally did. We finally reached the situation now where we have made some drastic changes in the work rules that are going to be very beneficial.

And you have got the decrease in personnel. That is going to be very helpful.

There has been a profit increase on the use of their cars from $102—my notes show—to $130. These figures are not exact.

Then we have the bad order cars that were leased to Rock Island on a per diem basis. That is bringing in income.

Of course, we have the subsidy contract with the State of New Jersey, which pours in—whatever it does—not enough, but still—I think there were two drawdowns. There is still a balance of some $5 million, is there, due by June of 1973?

Mr. Ward: Two million, your honor.

The Court: Two million. there have been advances, that's why.

We know we have the DOT behind us, to a certain extent. And I might say right now that $900,000 should be made available, Mr. Sharfman, right away quick.

Yes?

Mr. Sharfman: It will be, your Honor.

The Court: Then we have the Elizabeth lease, the Port leases; the possible joint use, or use in common of a bridge, and the sale of a bridge for four million something; the trailer container facility.

And I could go on with a few others. but you all heard what they are. But they are all indications, they are all activity, they all indicate that improvement is being made, that the condition of the railroad is not too bad, insofar as the bondholders; security is concerned.

It may be that there will be changes. And I don't doubt that there will be. And I think we are going to reach the point very soon—not too far away—where this Court is going to make a determination that either this railroad keeps on rolling along or we are going to shut the whole kit and kaboodle down. All I am deciding today is that on the basis of the present record I cannot grant the relief sought by the bondholders. And that denial is made without prejudice. It may be that the bondholders will

want to give a look at what happens on December 11 and then govern themselves accordingly.

You will now submit an appropriate Order, Mr. Weiss. And that is it.

Mr. Weiss: Thank you, your Honor.